REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. 2011-76724

HARRIS COUNTY, TEXAS, *Plaintiff*, and THE STATE OF TEXAS, acting by and through The TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, *a Necessary and indispensable Party*	*	IN THE DISTRICT COURT OF
v.	*	HARRIS COUNTY, T E X A S
INTERNATIONAL PAPER COMPANY, MCGINNES INDUSTRIAL MAINTENANCE CORPORATION, WASTE MANAGEMENT, INC., AND WASTE MANAGEMENT OF TEXAS, INC., *Defendants*.	*	295TH JUDICIAL DISTRICT

REPORTER'S RECORD

DAILY COPY

OCTOBER 29, 2014

On the 29th day of October, 2014, the trial came on to be heard in the above-entitled and -numbered cause; and the following proceedings were had before the Honorable Caroline Baker, Judge Presiding, held in Houston, Harris County, Texas:

Proceedings reported by computerized stenotype machine; Reporter's Record produced by computer-assisted transcription.

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OCTOBER 29, 2014

(Jury not present)

THE COURT: All right. We're on the record. Mr. Benedict.

MR. BENEDICT: The stipulation that I understand the parties have agreed to is that they stipulate that a reasonable attorney's fee for the TCEQ's attorneys in the Texas Attorney General's Office in this case through trial is $866,000, an even amount, exactly $866,000.

Defendants and the TCEQ agree that the defendants do not stipulate that the TCEQ is entitled to recover fees as a legal issue, and that issue is reserved for the Court to determine at a later date.

The stipulation also encompasses reasonable attorney's fees on appeal, which the parties stipulated for representation to appeal for the court of appeals at $26,500; for representation at the petition for review stage in the Supreme Court, $8,000; and for representation at the merits briefing stage and oral arguments in the Supreme Court, $26,500.

That is the stipulation. I think we have an understanding, since I represented to the jury they would be hearing evidence, that we just tell them that

that issue is something they no longer have to worry about, so they aren't expecting me to do something and I didn't live up to it. But I think that's the stipulation. That's all it is. The legal issue is reserved for the Court.

THE COURT: Mr. Reasoner.

MR. REASONER: Waste Management of Texas agrees with the stipulation.

MR. CARTER: So agreed, Judge.

MS. HINTON: MIMC agrees with the stipulation, Your Honor.

THE COURT: Thank you.

So, then, how do you propose we do that with the jury, if at all?

MR. CARTER: That doesn't need to go to the jury at this point.

THE COURT: Right.

MR. BENEDICT: Right. And I think simply telling them that the TCEQ has resolved -- our agreement is worked out, so they will not have to consider the TCEQ's attorney's fees.

MR. CARTER: I don't know that there's any issue that needs to be addressed.

THE COURT: I think -- that's why I asked the question. I think their point is that we just won't

be submitting that issue to the jury.

MR. BENEDICT: I agree. My concern is simply I told them we would be putting on evidence and they may not hear any now and think that I didn't live up to something. I'm not asking any comments on the merits or amounts or anything, just that they aren't going to have to decide that anymore.

THE COURT: The problem is if I say that, then I have to say the other part, which is that they're not waiving their argument about whether or not you're legally entitled to them; and I really don't want to say that to the jury.

MR. BENEDICT: You can simply say that "The parties have agreed that the Court is going to resolve the attorney's fees; and you don't have to," something like that.

MR. REASONER: I just don't want any implication that we're agreeing they're entitled to anything or that you're finding that we're liable for anything.

MS. HINTON: That's what worries me.

THE COURT: Let's go off the record for a second.

(Discussion off the record)

THE COURT: Back on the record. I think

the agreement is so that there is not any implication one way or another and that all parties' positions are protected on this issue, that the Court is simply, before Mr. Benedict rests, is going to let the jury know that the parties have agreed to submit the TCEQ's attorney's fees issue to the Court.

MR. CARTER: Judge, I think that that should come from you rather than the parties, themselves.

THE COURT: Right. I will say that.

MR. CARTER: Yes. And that -- and that will remove the TCEQ from also having any closing argument on this.

MR. BENEDICT: I disagree on that. I think I get to respond to allegations about what TCEQ did or didn't do. There are State issues in the case.

THE COURT: What about the stipulation? If the stipulation is entered, do you think there is a necessity for closing at that point?

MR. BENEDICT: There's more than that that was said. I think I can close on that and talk about the stipulation, that the allegation is made, they have invited a comparison; but there were also accusations that the TCEQ overreached.

MR. CARTER: Then we don't have a

stipulation, Your Honor. If that stipulation doesn't take care of that issue that was not addressed by International Paper, and if that issue has not been resolved by his stipulation that International Paper is voluntary agreeing to, we do not have a stipulation.

MR. BENEDICT: I'm not waiving a closing.

THE COURT: I hear two different issues being raised. One is if there's a stipulation about what the TCEQ did do, then there's no need to discuss that further. That's one argument. Then you had a separate point, I think you were making, that you feel like you should be able to respond to a suggestion that the TCEQ is overreaching.

MR. BENEDICT: It's actually a little more than that on the first one. It was that TCEQ didn't do anything. The stipulation says they did this. But they also invited a comparison of what defendants do. And I do intend to argue from some of the defendants' documents the information request.

I'm going to be offering -- I think we have redacted copies of those that are coming in about what their response was, or at least MIMC's response to what information requests were.

And then there were allegations not just that the government, but they specifically said Harris

County and the TCEQ are overreaching on penalties. The TCEQ is a party. I think we get to close on issues and allegations related to the State.

THE COURT: So let's put to the side for a moment an argument about overreaching. Their position is, regardless of any stipulation, that doesn't address the overreaching argument and they should be, at the very least, able to close on that.

MR. BENEDICT: That's evidence. I get to argue the case, like anybody else on an evidentiary point.

MR. CARTER: But that's not evidence. What was said in opening statement is not evidence. And so as a result, there hasn't been any evidence presented in the case on that issue. That happens all the time. People say things in opening statement where there's no evidence on it.

THE COURT: Is he entitled to say in closing, "You were told in opening that the TCEQ was overreaching and you didn't hear any evidence on that"?

MR. BENEDICT: Yeah.

THE COURT: Is he not entitled to say at least that?

MR. CARTER: If he wants to say that and sit down, then --

THE COURT: So let's assume for purposes of this discussion that I think you should at least be able to close on that issue. Now the question becomes, if there is a stipulation on the other point, do you get to say more about that? Generally, when there's a stipulation, that means that's an issue that's not in dispute, so there is no further comment about it.

Now you have a separate argument that you ought to be able to reference some of these documents about what you think the defendants didn't do.

MR. BENEDICT: Yes.

THE COURT: And that's from some of the documents you're going to offer?

MR. BENEDICT: That's correct. The ones we talked about last week that we have redactions on, the information request and their response.

THE COURT: Okay.

MR. WOTRING: If I may. To the extent they want to say that the stipulation takes things out of further commentary or further -- further testimony or evidence, they've got in their proposed slides for Bob Zoch, they have a stipulation. Evidently they want to get him on the stand to talk about the stipulation, itself, and where the penalties are going.

So to the extent the argument is -- the

stipulation resolves any and all further commentary on it, we need to talk about the scope of the testimony for Mr. Zoch.

THE COURT: Well, I think what they're saying is, like you do with any witness when there's a stipulation, you understand this is an agreement of the parties. I don't think anybody has a problem with that. It's if you take a stipulation and then you add to it or change it, then that defeats the purpose of the stipulation, which is what I think the defendants' objection would be if you were to do that in closing.

I don't think the stipulation in and of itself addresses what the defendants did or didn't do, and I think that's a different issue.

MR. BENEDICT: And I understand I'm not entitled to vary what the stipulation is; but it's argued, like -- I mean, during the opening statement, people discuss stipulations. It's part of the evidence of the facts of the case. That's what's stipulated, and I'm entitled to apply it as it relates to the arguments being made in the case.

THE COURT: Remind them of the stipulation?

MR. BENEDICT: Yes.

THE COURT: So then the second question that was raised was the issue with regard to the

documents that they're going to introduce, shouldn't he be able to at least argue those?

MR. STANFIELD: We haven't necessarily agreed for International Paper that he can offer those, much less offer pure attorney argument on it. He doesn't have a sponsoring witness. He has no disclosed witness to come testify. It would be trial by ambush to say "Let me put in documents and then offer pure attorney argument on what they mean."

We haven't been able to depose a TCEQ witness on this topic because, of course, they weren't listed on his "will call" list, which is an agreement the attorneys reached before trial. So now the TCEQ wants to come in, offer documents just on their face, without us being able to take a TCEQ witness on the stand on those documents and then argue what they mean to the jury. To us, that seems improper because we would need to be able to have a sponsoring witness with personal knowledge who we could depose before that issue comes into the trial.

MR. BENEDICT: Several responses. I don't guess the TCEQ anticipated being accused of doing nothing in opening statement. In fact, if you look at Bob Allen's deposition, there were questions where the defendants are saying I was comparing what Harris County

did as against TCEQ and Parks & Wildlife, all the others who were doing something. So we're entitled to respond to that. The fact that we didn't have a witness to respond to an argument we didn't know was going to be made on a "will call" list would be kind of bizarre that I would have been that clairvoyant to know that.

THE COURT: Well, I think that is taken care of by the stipulation, and just so you don't have to stand up and argue again about the opening statement being about dredging, I think that's taking --

MR. REASONER: You anticipated where I was going.

THE COURT: I think that is taken care of by the stipulation. The second argument is how do these other exhibits come in without a sponsoring witness?

MR. BENEDICT: And we discussed that last week. They're certified copies. They also -- we talked about authenticity under the hearsay rule, under the business records, and to the extent there are investigations -- public investigations. And I understood there was no issue.

I had a witness ready to come down. We talked about calling the project manager, and I think we agreed that wasn't necessary. We had him stand down.

MR. REASONER: To be clear, we said we're

not going to object to hearsay, but we're not saying these documents are relevant. Mr. Stanfield's concern is very justified when the only evidence that they will hear about this is counsel's argument in closing, saying whatever he wants about the documents, unsponsored by any witness, the stipulation --

THE COURT: What if he's simply referencing the documents as written, as opposed to interpreting them, because that's how I think he's offering them?

MR. BENEDICT: I intend to just read, for instance, and I think it's 154, MIMC's response. That's already in evidence. I would intend to read the answer.

THE COURT: "We sent this to MIMC. This was their response." He's not going to comment further, because I don't disagree with you about that if you don't have a witness you can cross about what it means. But if it's just a document that's being admitted and it says what it says and he just references what it says, I don't think that in and of itself is improper, is it?

MR. REASONER: Well, I guess I would be surprised to hear a lawyer ever just read a document and then not argue based on it or try to suggest to the jury what the proper interpretation of that document is.

THE COURT: Beyond saying "We sent them a request and this was the only way they responded"?

MR. BENEDICT: Reading the question, they responded, then arguing that that's not doing anything. You can make the argument, interpreting, that's a different issue than arguing. And I get to argue -- argue about the effect of what they did or didn't do. I can't interpret it. I understand that. I don't have a witness. But reading their words and then arguing why that's important, I think that's fair.

THE COURT: Depending on how you do it, I think that's not inappropriate, as long as you're not interpreting the document.

MR. REASONER: And, Your Honor, again, what's inappropriate is to transform what their role is without witnesses based on an argument that "They did nothing with respect to dredging," which they didn't. He's never -- he can't debate that or dispute that. They didn't for three and a half years.

So to then transform and say he gets that kind of a freeform pretending to be a witness in closing, "Let me talk to you about documents that you have not seen before" --

THE COURT: Well, let's say that you hadn't said it that way in opening. Wouldn't Mr. Benedict be able to introduce these documents?

MR. STANFIELD: Through a witness.

THE COURT: He can't just introduce -- well, I thought you-all were not objecting to their admissibility. You might be objecting to their relevance, but you weren't objecting to their admissibility in terms of the form, etcetera?

MR. REASONER: Yes. We're not making him have someone come here and say they're business records or official records for hearsay purposes.

THE COURT: So why wouldn't he always be able to introduce them as exhibits and just reference them as the TCEQ?

MR. REASONER: Right. If they're relevant documents -- Mr. Stanfield's point is through a witness.

MS. HINTON: Your Honor, I'm also befuddled about --

THE COURT: Why does he have to have a witness if you aren't objecting to the admissibility?

MR. BENEDICT: The document is the evidence.

THE COURT: Unless he's having someone interpret it, I agree with you on that. But if he's just saying, "Here's this document and it says X and we believe that's evidence that the defendants didn't respond," or something like that.

MS. HINTON: Your Honor, why do we have

witnesses, then? We could have just piled up all of our exhibits, our pre-admits, and then argued to the jury what the documents say, read them to them. We need a witness. But, in addition, we're somewhat befuddled about what this MIMC response to the information request is that's in evidence. We don't believe there is an Exhibit 154.

MR. BENEDICT: Did I misstate the number?

THE COURT: We'll look back at the exhibits that you were going to proffer.

MS. HINTON: We're befuddled about the document, itself, much less the fact that it's going to be an argument about the document.

MS. GRAY: And I would like to respond to the Court's question that if the statement hadn't been made in opening, and of course we don't agree with how they characterize that --

THE COURT: I understand.

MS. GRAY: -- but that takes us back to the pretrial hearings with regard to the fact that TCEQ has not joined in the Harris County claims and Mr. Benedict told the Court that the only role that the TCEQ was going to play was to prove up its attorney's fees.

And now that we have a stipulation on that, there wouldn't be any role or any need for the TCEQ to

have a closing -- a role in closing argument, because their issue is now before the Court and not before the jury.

MR. BENEDICT: Your Honor, I don't think I've ever said we're limited to attorney's fees. We have that claim, but I don't think -- I said I don't intend to get up and say that, but I'll address issues that affect TCEQ or the State. I think I've always been clear on that.

As I pointed out, we are joined at the hip because we get half the penalties. There wouldn't be anything improper if I was up here every witness questioning. We typically don't do that, but in this case there are issues that have been raised specific to TCEQ, I'm entitled to respond. I'm a party.

THE COURT: So are you-all or are you-all not requiring Mr. Benedict to have a sponsoring witness of the documents, because I understood you were not objecting to the admissibility?

MS. HINTON: I have to see what the documents are.

THE COURT: Okay. Let's go through the documents, then.

MS. HINTON: I've never seen it.

MR. BENEDICT: Number one, and this is one

that they haven't seen yet. I notified them last night. It's a negative certification under TCEQ under 803.10, the Absence of Public Records. It's in the form in accordance with Rule 902 for authentication. Harris County asked for this. I just forgot it was there. It is a negative certification that there was no discharge permit. That may no longer be an issue, but I don't know if there's any evidence.

THE COURT: I don't think that's an issue.

MR. BENEDICT: And I would have that.

MR. CARTER: We would object.

MR. STANFIELD: We would object.

THE COURT: No. What I'm saying is, I don't think that's an issue, so I don't think that exhibit is necessary. Nobody is suggesting that there were applications.

MR. BENEDICT: That's why it was retrieved, just in case there was. And then we have the two July 28th, 2006 letters from TCEQ, one to MIMC, one to Waste Management, information requests that we discussed last week that we have redacted copies for the Court that I would put in as the exhibit. I may offer the unredacted in a separate bill of exceptions.

THE COURT: Will you show those to Ms. Hinton, and I think there's one for MIMC and one for

Waste Management?

MR. BENEDICT: MIMC and Waste Management, yes. I think we had shared those last week, copies of them, and redactions.

THE COURT: You did, but if you'll show them now, if you don't mind, with the redactions. And to remind everybody what we did with that, was we took out all the parts except the list of -- I think -- as I recall, the list of requested items, or something like that. Just look at them and see what you-all think about that.

MR. GIBBS: Your Honor, one issue here. One difficulty that arises from the absence of any witness, for example, and permitting a lawyer to get up and pontificate and interpret a document that's otherwise not sponsored is this: I think Mr. Reasoner's point in opening and otherwise was that we're not -- as we've established, we're not charging him with a liability accusation.

It was simply and restricted to the notion in support of the idea that we were reasonable in our response in the face of dredging out there occurring over a span of a couple of decades. And the absence of any regulatory prohibition or activity and/or the continuation of permitting of that. So it was dredging

only, inactivity by the regulator with respect to dredging that was pointed out as a context in which our conduct was naturally reasonable and not -- and assuming that there was not an issue there.

As I understand it, they want to put in, in response to that, "Oh, well, not limited to dredging and what they did or didn't do with respect to dredging," but here we did other things unrelated to dredging, some broader notion of what we were doing out there. We never -- we never made the statement, "Well, you didn't do anything out there with respect to it." We were talking about dredging. And so --

THE COURT: I don't disagree with you. I think that's what the stipulation addresses, that any concern that would have come from the presentation in opening statement. I think what Mr. Benedict is saying is separate and apart from that. He believes as the State, he should be able to put these documents into evidence to show what the defendants were or were not doing; and I haven't ruled on those yet. We talked about redactions, and I want to let you-all look at them.

And what I'm trying to determine from the defendants is are you saying you don't agree to him putting them into evidence without a sponsoring witness

or you do, and you have other objections to the documents. So I think that's where we are. I don't think these are in response to the opening statement. These are separate and apart with regard to what you feel the defendants did or didn't do.

MR. BENEDICT: And I think that was something that invited the comparison in opening statement. So it is in response to --

MR. GIBBS: That is precisely my point.

THE COURT: So I do not think -- and I've looked at that opening statement several times. I do not think that counsel for Waste Management invited a comparison in a negative way, meaning that something the TCEQ did was wrong. I think they were putting it in the light that we've discussed before, which is that "What we have done is reasonable because other people were doing the same reasonable thing."

I did understand, however, your concern, Mr. Benedict, that even with it limited to dredging, that one of the things the TCEQ did is they may not have said, "No, don't dredge," but they did something else instead, which they believed would ultimately lead to a more permanent result.

MR. BENEDICT: Yes.

THE COURT: So, to me, that would be

responsive to that opening statement, even if it were confined to dredging; and that is why I talked to you further about that and you-all were working on a stipulation. But I don't think that the opening statement invited a comparison in the way you're framing it between the defendants and the TCEQ.

MR. BENEDICT: I think there was even a statement of comparing in realtime what they did and invited -- and where it's going, these letters, Mr. Cedilote, you know, is the one who wrote the report. That's not in the stipulation. As part of that process he sent these information request letters to MIMC and Waste Management, and we have the MIMC response where a year after the fact MIMC is essentially saying, "We don't know anything about this site. We've never operated it. We don't have any records at all." And so while TCEQ is doing the investigation, defendants are still giving -- or at least MIMC is giving information to TCEQ, "We don't know anything about this place." And I think that has been invited. I think it's relevant, and it also goes back to the state of mind of the Exhibit No. 8 e-mail from Mr. Cedilote where he apologizes for the heartburn. I think it's responsive to that. And I think I'm entitled, those are TCEQ issues, to make this.

THE COURT: His argument is separate and apart from the opening statement. He believes he ought to be able to raise these issues in response to Exhibit No. 8, the Cedilote e-mail.

MS. HINTON: I need to see the MIMC response also, since it's not on the pre-admit list. But looking at this document from July 28, 2006, even in its redacted form, it's incredibly misleading to the jury.

I'll tell you, it is a request and opportunity to conduct response actions and information requests. In the redacted form it clearly creates the implication that MIMC is being asked about this property, giving a legal description to let the jury think that MIMC owns this property. MIMC does not own this property. It's not record titleholder, and this has nothing to do with the comments that were made in opening statement about they weren't doing anything about the dredging.

They were part of this response action and info request to McGinnes, but these letters have nothing to do with opening statements; and as redacted, are incredibly misleading to this jury with this real property description in the information request.

MS. BALLESTEROS: And, Your Honor, also,

these would open the door to all of the Superfund information in the case that we have kept out until now. This would require us to come back and respond and put in the response to this letter and all of this lead down the road to the Superfund issue, and that has been expressly carved out of the case. None of this has anything to do with dredging. And all Mr. Benedict wants to do is sort of have the suggestion in there that they were doing things, but the response to this would be, "Well, let's -- let us put in the response to the Superfund issue," and that's been off limits in this case.

THE COURT: So I guess the question for you, Mr. Benedict, is, once again, it would be one thing if MIMC or Waste Management were taking the position that they did certain things at the Site, you know, to take care of it or address it or maintain it; but they have consistently taken the position that "We don't have a duty to do that and that we didn't do anything with regard to this Site. We didn't continue to monitor it. We didn't see what was going on with it. We didn't think we had any obligation to do so."

MR. BENEDICT: That's not what the answers say. They say they don't even know about the Site.

MS. HINTON: And, of course, they don't,

Your Honor, because MIMC was not the record titleholder. And the memo he referenced --

THE COURT: May I see the unredacted copy of the letter?

MS. HINTON: Only talks about ownership of the property, that they have discovered, in fact, that MIMC did not own the property. That is all that memo referred to. This is a full-blown investigation, and with that real property description that is incredibly misleading and nothing to do with the arguments made in opening statement. And to echo Ms. Ballesteros, we're headed down the road of the whole EPA.

MR. REASONER: It's two separate issues, Your Honor. The fact that they were involved in a study is one thing.

THE COURT: Right.

MR. REASONER: What he wants to now get into is to say they weren't very quick in their response and the back and forth and a lawyer sent a letter. It's the whole back and forth of the Superfund issue, which has nothing to do with what's been before this jury. It's totally separate from the "we did a study" stipulation.

MR. BENEDICT: TCEQ is sending requests for information and being told "We never operated the

defendant site. We don't know anything about it;" and that, I think, is relevant.

THE COURT: What is that relevant to?

MR. BENEDICT: Going back to they invited a comparison in realtime with what the TCEQ did and what the defendants were doing. TCEQ started their investigation, they're making information requests, and defendants are saying -- or I say "defendants," MIMC is saying "We didn't even operate" --

THE COURT: Well, there's no -- the whole purpose of the stipulation is so that there's no impression left with the jury that TCEQ did nothing in response to the issue about dredging; and the details in that stipulation make it clear that TCEQ did quite a bit.

Why is it then necessary to talk about how long the investigation took or what the process was like? The point you're trying to make to the jury, which I think you should be able to, is that they did a thorough investigation. They produced a 2,000-page report. And so if any impression is left with the jury that TCEQ did nothing in response to the issue with regard to dredging, that stipulation should take care of it.

This now is going into how involved the

investigation was, whether or not they were being helpful with it. And I do have that concern that the defendant just raised that if I let these letters in, then they have to respond, which means we're going to be talking about the Superfund site.

MR. BENEDICT: Your Honor, if I can look back on that. This is a letter we talked about last week. Those redactions are the ones the Court suggested be made in our discussions last week. All references to "Superfund" are taken out. All it says is "Here's the site. We're asking you what you know about it, and here's the questions."

And then there's an exhibit -- and I believe it's 154. I think Mr. Rodriguez confirmed to me yesterday it is and he thought it is in. It is MIMC's response to that, a 40-some-page document where they answer the seven questions.

THE COURT: Okay, two things. If there's a document that's already in evidence, there's a document that's in evidence and you can talk about it. But, yes, we did talk about potential redactions. But the problem is, in thinking this all the way through in terms of the effect, is by taking out the portion that's about the Superfund process, it's misleading to the jury and under what context the TCEQ is asking for the information.

And then if I let in their response, then they have to respond by saying the other things they did as part of that process, which led to the Superfund site.

Let me look at the unredacted copy, but I think where I'm coming down on this is that if they were suggesting that your investigation was not quick enough or appropriate or not comprehensive enough, that might be an issue. But the stipulation, if it comes in as you proposed, shows a pretty comprehensive investigation with a 2,000-page report, which I think in and of itself alleviates any concern about the suggestion in opening that the TCEQ did nothing in response to dredging, because that shows what your response was.

It may not have been to say "stop dredging." You had a different response, which as we've discussed, you thought would be more appropriate and have a more permanent, long-lasting result; and I think you ought to put that in front of the jury and be able to.

MR. REASONER: Your Honor, if I might, just getting back to what was originally really focused on. Mr. Stanfield now has confirmation from his client that the stipulation, as the Court described it, is acceptable.

MR. STANFIELD: With the proviso that it's introduced to them as "This is a stipulation about the TCEQ."

THE COURT: So right now the way it reads, so everybody can hear it, and then I'll give it back to you, Mr. Benedict.

The Court would advise the jury, before Mr. Benedict rests, that the parties have entered into a stipulation about the TCEQ and it is as follows: "After the TCEQ received the Texas Parks & Wildlife Department's April 2005 letter regarding dredging, the TCEQ continued sampling sediments as part of a Total Maximum Daily Load Water Quality study of the Houston Ship Channel system and participated with the United States Environmental Protection Agency," EPA, in quotes, "in investigating the site. The investigation efforts are documented in a five-volume report of approximately 2,000 pages dated September 2006 and entitled 'Screening Site Inspection Report' prepared by the TCEQ and submitted to the EPA.

"In October 2008, the TCEQ requested that the United States Army Corps of Engineers, quote/unquote, Corps of Engineers, suspend the dredging permit which had been extended by the Corps of Engineers in December 2007."

I'm just taking out the extra "in." That is very specific. It shows specifically what the TCEQ did in response to the dredging letter. It details the length and breadth of the investigation; and I think unless the defendants are questioning the quality of the investigation done by the TCEQ, which I've not heard that they are going to do, I think this stipulation should be sufficient and that the documents wouldn't be necessary.

MR. BENEDICT: Your Honor, at some point in time I do want to make an offer of proof, get specific rulings on the documents.

THE COURT: You may.

MR. BENEDICT: If I may, we were talking about what I believe is Exhibit 154. And again, I have not been as into the weeds on all the exhibits. This is not marked. This is the State's copy. That's the --

MS. HINTON: And it is not a pre-admitted exhibit, Your Honor. It was on their list, but I'm looking at it online. It is not pre-admitted. And this takes us right down the road Ms. Ballesteros warned us about. This is the first response.

MR. BENEDICT: I don't think the letter, itself, refers to Superfund. The site wasn't listed yet. We had seven questions to answer, and I think in

looking at the answers -- and I'm characterizing, I'm interpreting whether that was raised. You can read it, but they are denying any knowledge of even ever operating the Site.

THE COURT: This is --

MS. BALLESTEROS: Your Honor, we're not sure whether or not that actually is a pre-admitted exhibit.

MS. HINTON: It is not a pre-admitted exhibit. It is not pre-admitted, and it's taking us right down the road we've all been concerned about.

THE COURT: I'm not sure what it's relevant to that's still at issue in the case.

MR. BENEDICT: Okay. Again, I go back and I don't want to belabor the point. I think there were invitations to compare what defendants did and what TCEQ did. TCEQ did an investigation, and they're still providing information "We don't know anything."

MR. REASONER: And again, I'm going to ask that when my opening is talked about, whole paragraphs and whole sections are talked about. Things are taken out of context.

THE COURT: Just to be clear, I have looked at that portion of the opening statement many times. It is clear to me in the way the entire part is worded that

it is talking about dredging. However, because the TCEQ's response wasn't to say "stop dredging," that didn't mean the TCEQ didn't have a response. And so that's why we talked about the fact that the TCEQ ought to be entitled to establish in front of the jury just what they did in response to the dredging issue and that was the purpose of the stipulation, which is very detailed.

And so I don't see why -- how they responded during their request for information is relevant to any other issue, and it certainly gets into the Superfund discussion, which they would necessarily be required to get into to respond to the documents. And no one has criticized the investigation, or will criticize the investigation, that TCEQ did.

If they do, I will revisit that issue; but my understanding is by entering into this stipulation, they're agreeing they're not going to make any comment about that.

MR. BENEDICT: And then I'm back to the last thing, Your Honor; and I don't want to beat a dead horse. Exhibit 8. Mr. Cedilote sent the e-mail, the heartburn e-mail. This is about 14 months later and Mr. Cedilote sent it again to them; and he's still being told "We didn't even operate the Site. We have no

knowledge of even operating the Site."

MS. HINTON: And that is a pre-admitted exhibit that was agreed to by the parties --

THE COURT: It is, but in all fairness to Mr. Benedict, I don't think that I have read the limiting instruction with Exhibit 8.

MR. BENEDICT: Yes.

THE COURT: And so I will sustain the objection to the exhibit that Mr. Benedict is offering, but I think I need to read the limiting instruction at whatever time is appropriate that goes along with Exhibit 8 because it was only being offered for the purpose of showing Waste Management's state of mind as to why they proceeded the way they did and not for the truth of the matter asserted. So it's not putting Mr. Cedilote in the position of taking a -- making a legal conclusion. And so that limiting instruction does need to be read to the jury, to be fair to the TCEQ.

MS. HINTON: And that letter, as you recall, Your Honor, just said he had discovered that the record titleholder was Virgil C. McGinnes, Trustee. "Sorry for the heartburn."

THE COURT: That's all it said, but it was being offered for the limited purpose and we haven't read that limitation to the jury.

MS. HINTON: Thank you, Your Honor.

THE COURT: Okay. I will put these to the side because I know you want to make an offer of proof.

With that, are we -- did I give you back the stipulation?

MR. BENEDICT: You did.

THE COURT: Okay. So off the record for a second.

(Discussion off the record)

THE COURT: We're back on the record.

MR. CARTER: Thank you, Your Honor. So when we were wrapping up last evening, we were discussing the very narrow issue of the charges being made under the Spill Act against Champion, or International Paper.

And as I mentioned when I first started, we've moved for a directed verdict under the Spill Act because we've been charged with violating that act in a way to subject ourselves to punishment for a claimed release beginning in 1985, 20 or so years after the disposal took place and after the disposal ended.

My motion for summary judgment you have previously ruled, as I mentioned yesterday, that under the language of the statute, IP was not the operator or the person in charge of the facility in 1985 at the time

of the alleged release. You've also ruled on summary judgment that IP was not the landowner. Those issues have been determined.

So IP believes that this ends any charge by the government under the Spill Act because owner of the facility means owner of the property or the impoundments, themselves, not what's contained within the impoundments. That reading is consistent with the purpose of the Spill Act so that the person who is in the best position to control the spill, owner, operator, or person in charge of the facility at the time that the spill occurs, is the person that should be responsible for ensuring that that spill is addressed.

The Court, however, in an abundance of caution, as I believe, has posited the question: Could the owner, in the context of owner of the facility, include the owner of the waste? So since you've asked the question, and it was after our summary judgment, we have developed conclusive evidence on the issue; that is, if the owner of the facility includes owner of the waste, Champion did not own the waste post-disposal.

This is simply a property law question. Once personalty becomes affixed to the land, it becomes the property of the landowner. MIMC and we agree on this point. You heard yesterday the testimony of MIMC's

corporate representative that once the -- once the waste was disposed of on the property of the landowner, it became the realty of the landowner.

And that is the evidence to date. And you've heard the evidence from the County's own witnesses how the waste becomes part of the land. We went through with Dr. Bedient and Dr. Pardue about how the -- how the waste attached to trees and grass and all of that issue.

So once it becomes part of the land under property law, to separate it, now becomes a fixture. To separate the fixture from the land, itself, there must be some agreement with the landowner reflecting that that fixture is, indeed, not part of the land. In other words, Champion -- there must be some document that reflects that Champion retained some reversionary interest in the fixture that became part of the land.

The County has not come forward with one scintilla of evidence of Champion retaining a reversionary interest. In fact, the evidence is to the contrary. The contract, itself, was to remove and dispose of the waste from Champion's facility, and it was disposed of into the property of the landowner.

The County cites to one document that it says is evidence that the waste was Champion's. Of

course, that is not a legal document. That was in the time of the operation; and as the Court has recognized before in addressing that same argument, that says nothing other than the fact that it was clear during that period of time in 1965 that Champion's waste was being removed and being deposited into the property of the landowner. This is certainly not evidence to overcome a directed verdict on this issue.

The County then turns and argues, "Well, the waste is not an improvement." The case law is clear on that point, and we pointed this out to the Court yesterday. And even the cases cited by the County do not support this proposition.

And regardless, at this point, that issue is simply an issue of law. There is no evidence, there is nothing to go forward to the jury for the determination of whether or not the waste is still owned by Champion, especially in 1985.

So at this stage of the case, our motion for directed verdict should be granted on this issue. The County has not brought forth any evidence that Champion or IP owned the waste in 1985. As a matter of law, we were not the owner of the facility at the time of the claimed discharge for purposes of punishment under the Spill Act.

THE COURT: Would you also address the argument by, I believe it was Mr. George, about the fact that IP fits within the definition of an operator referencing CERCLA?

MR. CARTER: Right.

Jen, can you pull up that slide for us?

MR. STANFIELD: I think it's Slide 21. No --

THE COURT: It's not 21.

MS. GRAY: 16 of Harris County's --

MR. STANFIELD: Oh, no, I'm looking for ours. It's Slide 4.

So what they've cited to Your Honor goes back to actually the *Best Foods* case, and we put it here on the screen what the *Best Foods* case says an operator has to be, "is someone who manages, directs, or conducts operations specifically related to pollution; that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."

Of course, there's a time element here, as Mr. Carter noted, because when we look at the Spill Act, it has to be the owner or operator in charge of a facility at the time of the spill so that that person can take a specific action. And what the County has

done is pointed you to the CERCLA definition. Of course, these CERCLA definitions sometimes come in and out of the case. But regardless here, it may have some usefulness because we do not fit this definition of operator.

And there is no evidence, whatsoever, that we ever operated the facility at issue here. So that's just not viable. But this is what the *Garrity v. Miller* case referenced from the Fifth Circuit in 2000, was this *Best Foods* definition.

MR. WOTRING: Briefly on the facts, and I'll let David handle the law. The testimony and the evidence about the ownership of the waste issue, again setting aside the toggle switch or Tony's light switch argument, I believe if you look at Mr. Slowiak's testimony from one of the earlier days in this case, the corporate representative, where he talks about it being Champion's waste, that's in response to a quotation from the findings of fact that were submitted to the jury, not as a findings of fact, but as do you agree or disagree with this statement. He characterized it as Champion's waste at that time.

The second piece of evidence about which -- which is a current -- and the corporate representative's position currently in this litigation -- his deposition

I think was taken in 2014.

THE COURT: Your point is, he didn't say "We generated the waste, but we don't own it anymore"?

MR. WOTRING: That's exactly so. So if we back up and go to the beginning of this from December of 1965, we have the Private Champion Memorandum, as we've been calling it; and I'll find the exhibit number soon. And in that they also call it Champion's waste, or to be more specific, Champion's, apostrophe (s), waste at that time. So you go from 1965 to 2014 with Champion and International Paper recognizing that this is their waste and they have an ownership interest, certainly getting you beyond the scintilla of evidence for that particular issue on the ownership of the waste.

Then once you get into the ownership of the waste, it takes you down the path of the ability to control. Our review of the law, and I may be stepping out of bounds, is the *Garrity v. Miller* case. Our understanding is if you're an operator, you have the authority to control the cause of the contamination at the time the hazardous substances were released into the environment. So that's our understanding of *Garrity v. Miller*.

And we have up on the screen -- if I can have the exhibit number from the Private Champion

Memorandum. Exhibit No. 16, as redacted in the very first paragraph -- if I can have that first paragraph blown up --

THE COURT: And then you reference the last sentence.

MR. WOTRING: And the last sentence in that document, again, Exhibit Number 16, as redacted --

If you could pull that up, Bryan. Next page.

I'm sure -- this is a quote from Exhibit No. 16, as redacted. The last paragraph, it says, quote, I am sure we all realize the sensitive nature of this entire operation and the need for special precaution in connection with the disposal of this waste material, end quote.

So if you put the first and the last paragraph together and the paragraphs in between, that is evidence that Champion understood this to be their waste, their operation, and certainly their problem. And that is consistent with the -- the way that it's treated in the -- the April/May Texas State Department of Health investigation where you have a Champion representative out there at the Site, discussing the Site as if they are involved in the operation, which, indeed, they are.

And certainly at the time if you believe Champion's view of what they were doing, they were putting in waste watery sludge into the Site, this litigation is about, and shipping water back. So this was part of their operation in handling their waste operation materials.

So for all those reasons, we think they certainly qualify as an owner, at least there's a scintilla of evidence about their ownership -- more than a scintilla of evidence about their ownership. They qualify as an operator. Therefore, they qualify for liability under the Texas Spill Act.

I don't know that we need to respond further on the argument about fixtures or not fixtures applying --

THE COURT: I do want to ask one question about that. Can you imagine a situation where something would be considered a fixture that's not something that adds value? In other words, there may be something that's affixed to the land that's an eyesore or that's just -- the person who put it there and affixed it to the land liked it, but when you try to sell the property, it's not something that adds value, it detracts from the -- from the value of the property --

MR. GEORGE: Well, Your Honor --

THE COURT: -- that can't be --
MR. GEORGE: -- the improvement would be -- it's a betterment and it adds to the value. And the case we cited from the First Court --
THE COURT: You believe it absolutely has to add value to the overall property?
MR. GEORGE: To be an improvement -- I mean, the reason we used the common law -- used the word "improvement" was from that concept, which is built into it, and the courts have held -- Texas courts have held that -- defined improvement as adding to the value, and a fixture must be an improvement.
Now, there can be cases where it doesn't necessarily in the end -- for example, in the cases we cited, one of them --
THE COURT: Your point is it may be intended to add value, but then it has something wrong with it.
MR. GEORGE: Well, like the asbestos pipe. In 1950, when you built a building and put asbestos pipe in, you added value to that building; and the key is at that time, the intent and what happened at that time. In retrospect, in 2000, there was some negative to it; but at the time there was adding value.
And if I could get the --

THE COURT: And is your point also that no one could say that the intent at the time of this disposal was to add value to the property?

MR. GEORGE: I don't say that, Your Honor -- yes, I say that, but I say that with evidence because we have in the board minutes in 1968 in realtime the property was worth 50,000 and now that it has been put to its intended use and has been, you know, improved, it's been improved to the tune of being valued less.

If we could go to Page 8. So we know then that when they put this stuff in, it made the property go from 50,000, which is half a million today, a lot of money, to being a nominal value of 1 dollar. So it was intended to and did destroy the value.

And we look at this. The idea is should this be the property of the landowner, and I think the idea is if you're going to put stuff in that improves it, that goes to the landowner; but if you're going to put something in that would totally destroy it, make it worse, we're not going to accept any agreement and impute that onto the -- to become the property of the realty.

I think it's also clear that the idea was that this was supposedly clear that Virgil McGinnes

owned this land and that everybody agreed that this was going to go and be put there and be Virgil McGinnes' land. Well, there's not one document where Virgil McGinnes ever agreed that this would become part of his land. These agreements are not with Virgil McGinnes.

So I think that falls apart that these -- that if it's supposedly his land, that these third parties can come and agree to that. And also, I thought it was telling -- Mr. Muir asked -- the tape they played at the very end when MIMC's courtroom rep, Mr. Golemon, was asked, "Who does this waste belong to at the end?" He said, "The realty owner."

MR. CARTER: Mr. Muir asked that question.

MR. GEORGE: That's right. Mr. Muir asked, and then they played it. And then the next question is, "Well, how might that happen?" He says, "I have no idea. No idea." So, yeah, they can throw that out as a naked assertion, but they had no theory, MIMC had.

And so just in conclusion, the fixture, this is a --

MR. WOTRING: Let me handle it.

There is a fact issue on the fixture on the fact that being affixed to the land, which I think we touched upon yesterday, and that some of it does -- well, I don't think that there is a legally established,

for the purposes of a directed verdict, claim that they can make that the paper mill sludge was affixed to the land. The testimony is that it was in earthen pits, that some of it -- some of which would adhere to the sides, but that a lot of it is gone and has washed away with the tides and the water of the San Jacinto River.

So I don't think for the purposes of directed verdict they have established conclusively that this is a fixture that it is affixed to the land as opposed to something being placed on top of the land. Then you can reference Mr. George's statement yesterday about the intent at the time was that it not be affixed, that it be placed in between the land and -- and the earthen pits with a clay like --

MR. CARTER: Judge, we're sort of turning this on its head. I think the plaintiffs have the burden of proof here. They've come forward with no evidence on any reversionary interest back to -- back to Champion for the waste that was deposited into the -- into the disposal area.

And when we talk about fixture, and I turn to the Court's attention Slide 17 of our presentation, there's no issue about increase in value, that that's a requirement to establish a permanent annexation to the property. The key factor, and we point to you the

Hernandez vs. Renker case, 14th District Court, 2009, recognizing that permanence is the overriding element of consideration. And that is the issue that is -- did this become a permanent part of the land, that's the key.

They talk about ownership, or the issue of operator in the *Garrity v. Miller* case. And the quote that they say in their presentation is "an entity that is an operator if it had the authority to control the cause of the contamination at the time the hazardous substances were released into the environment."

And remember, under the Spill Act we're talking about 1985. There is no evidence that we had the authority to control the -- a -- a release in 1985 that's been presented by the County under any theory that's viable here in this case, Your Honor.

THE COURT: Let me let you respond to that, Mr. George.

MR. GEORGE: On the statute of limitations -- on the burden of proof, we have -- we met our burden of proof when we showed this is Champion's waste at the beginning; and once it's your property, it continues as your property, unless you can show how it ceased to be. So they now have the burden to show that it changed. So we've shown it's Champion. They need to

show it's not.

And then on to the issue of the fixture and the issues of permanence, we don't dispute that when you go over the elements of is this type of improvement a fixture, permanence, intent, those aren't elements; but those are the secondary point. We begin with, and this is their own briefing says it, black letter law, a fixture is a type of improvement.

And so if we want to know if this improvement meets the category of fixture, we go through a checklist; but we begin with is it an improvement. And as we've said, improvement requires a betterment. 99.9 percent of cases do not discuss that. They have no need to discuss that because most people don't put stuff that harms their property; but the cases we cite, the First Court of Appeals case, describes it as improving, as well as that being the common law throughout the country, as in our last brief we gave you examples throughout. That is just common law. That is historically why it's called an improvement.

MR. CARTER: The final issue on this, Judge, is that I'm afraid the County has got it wrong, is that once the property goes into the -- into the disposal area, it is a fact; and once it becomes attached, it is a fixture. It becomes the landowner's

property, unless there is some document that shows that there is a reversionary interest from the landowner back to, in this case, Champion.

They have the burden of proof on that issue. They have come forward with no evidence to show that this property, this waste, reverted back to Champion. That's their burden of proof. We have seen nothing of it. There is nothing of it.

MR. GEORGE: Reversing -- that's talk of realty. This is personalty. This remains personalty. It did not convert to realty. So speaking of reversionary is wrong.

Your Honor is going to see a video, perhaps, of Mr. Zoch -- or Dr. Zoch --

MR. STANFIELD: I don't know what you're talking about.

MR. GEORGE: The slide you showed yesterday. The ship coming in --

MR. CARTER: This is not evidence in the case. At this point in time --

MR. GEORGE: Your Honor -- please, sir, let me finish.

THE COURT: I think what Mr. Carter is raising is at the directed verdict stage, you can't reference evidence that's not in.

MR. GEORGE: Let me tell you this: There is no question that they act as if this was buried. This was not buried. They built up berms, they built up walls, and they put personal property in it. And as it's poured in, some of it dries, poured in. That is a placement of personal property. That's not burying it. That's not incorporating it. You place your personal property on someone's land. That's not a fixture.

MR. CARTER: Under the terms of art, Your Honor, personalty -- it was personalty on the barge. Once it went into the disposal site, it became affixed to the property. There's no dispute about that. There's no evidence disputing that.

Once it becomes affixed to the property, it becomes real property. The issue then becomes an issue of real property law; and at that point in time, for there to be any interest of Champion, there has to be a reversionary interest back to the landowner. And we have seen no evidence.

THE COURT: I think I understand everybody's position on this. Let's move on to the next motion for directed verdict.

MR. STANFIELD: All right, Your Honor. And just to reiterate one thing on the Spill Act, which I think you understand; but just to be clear, and as we

put on the slide up on the screen, the Spill Act is about current owners and operators at the time of the discharge, not former owners and operators, and that's incredibly key.

And we would encourage you to actually look at the case law, and that will be cited in our briefing on ownership. In particular, the Supreme Court of Texas cases that lay out what the standard is and that the term "improvement" is a term of art in the law that goes far back and is much like the term "suffer." Today we might use it differently than it was used by the court of Exchequer in the 1800's. So it's -- we can't draw a false dictionary distinction today based upon how terms have been used long over time.

All right, Your Honor. The next motion for directed verdict that we have goes to the issue that there is no evidence of a daily discharge.

Jen, can you skip forward to Slide 23?

Your Honor, to recover daily penalties, Harris County has to show a daily violation. That's according to the code. That's according to the case law. Here there is no evidence of a daily release through the site as a whole, much less in part; and Drs. Pardue and Bedient are insufficient to prove that point.

Dr. Pardue discusses three release mechanisms: tidal action, levee breach, and submergence. These all do appear to be somewhat combined with one another; but, Your Honor, let me start with tidal action.

There is no evidence of tidal action, certainly not prior to July 1st, 1989. And what we put on the screen is his actual trial testimony from October 21st where he noted that it was impossible for him to determine whether or not tidal action caused any release at any point in time on any specific day.

And, in fact, the questions and answers went like this:

"QUESTION: Was there tidal action that resulted in waste material being released from the pits on that day?"

And we're talking here about the Bicentennial, July 4th, 1976.

"ANSWER: That is impossible to know.

"QUESTION: You don't know, do you?

"ANSWER: It is impossible to know.

"QUESTION: Do you know whether there was waste material released from the pits on July 4th, 1976?

"ANSWER: No."

And notably, that question was not limited

to tidal action. That was from any mechanism, whatsoever. And then, of course, the questioning went from there and he admitted, "No, I can't tell you on any particular day whatsoever."

In addition, Your Honor, from 1973 through July 1st, 1989, all Dr. Bedient can rely on really, and Pardue by relying on Bedient, is tidal action, unless he has an aerial photograph showing a breach in the levee and water exchange. He cannot rely on flood events, and he cannot rely on tidal action -- tidal action because your instruction says you can't rely on it prior to July 1st, 1989, and flood events can't be relied on because the Highway 90 gauge data is out for all purposes in this case now pursuant to the instruction from the Court.

Consequently, from 1973 through July 1st, 1989, there is absolutely no evidence, whatsoever, of waste material getting out because there is not sufficient evidence of any particular day, one, that there was exchange of water; and, two, that that exchange was sufficient to cause a release.

Your Honor, once we get to alleged submergence into the water, I just need to point out that even that testimony is not going to be adequate, even after 1989, because as Dr. Bedient testified, that

still relates to his tidal theory about the tide coming in and the tide going out. And we put on the screen testimony from October 23rd here where Dr. Bedient was asked, again, just in general, about tidal action:

"QUESTION: So for that date, you cannot tell us whether there was a release of waste material into the river on that date, right?

"ANSWER: In which year?

"QUESTION: May, 1977.

"ANSWER: Well, what I do know is that by that point in time, a breach was certainly present in the levee and out in the river, and all the photographs and all of the evidence that I have seen shows that there was a connection starting in '73, certainly shown in '76. And so" -- and this is clear -- "the opportunity certainly is there for there to be exchange on that day.

"QUESTION: The opportunity?

"ANSWER: Yes. Now, do I know the exact elevation of water and all of that on particular day? I -- I don't know.

"QUESTION: And you would need that information in order to offer an opinion whether on that particular day there was a release, right?

"ANSWER: On that particular day."

Your Honor, this goes forward actually past '89, as well, because what you will remember from the evidence and from the testimony is that, in fact, all we ever get are opportunities for discharge. That's all we ever get. We don't get testimony that, in fact, there was on any given day. So we've shown more testimony:

"QUESTION: Dr. Bedient, let me just ask you if you remember a deposition and being asked these questions and giving these answers."

And then he goes through it again and confirms, yes, we're only talking about opportunity.

In fact, it was clarified with him:

"QUESTION: And you'd agree with me that there is a difference between conditions creating the potential for dioxin to be released and documenting it and showing an actual release on a given day?

"ANSWER: Oh, I agree with that.

"QUESTION: Just to be clear, you can't say that there was a release from all three pits on any given day, correct?" Any given day, any time period.

"ANSWER: That's a correct statement."

That's the state of the evidence, Your Honor. There is no evidence of a daily release in this case. The same thing is true with Dr. Pardue, and we can go through Dr. Bedient's testimony about this.

Let's go to flooding real quick. I just want to clarify on flooding and here is why they don't have evidence of flooding, because he did no -- he testified about this on October 23rd at Page 54, Lines 1 through 12, that he did no analysis to determine the number of days where there was flooding.

And he further admitted -- significantly after 1989, Your Honor, Dr. Bedient admitted to the extent we're in three versus one, as we should not be. To the extent we are, he admitted that the western section of the impoundments was not inundated every day after 1989.

And so we have Bedient admitting that he can't say there was a release from all three pits on any given day. He did not offer opinions about releases from the particular impoundments or pits. Again, he considered them as one site. And, consequently, there is no evidence that he can support of discreet releases from any pits on any day, much less every day.

So here we've walked through what we count as really maybe four to the extent flooding and tidal action and submergence and breach are all separate. This is how your instruction plays into this case before July 1, 1989: Tidal action can't support it. Submergence doesn't occur prior to July 1, 1989,

pursuant to the testimony. The breach is not enough unless you can show specific water exchange with either flooding or tidal. You can't get there without the Highway 90 gauge. And he offered only six flooding events, but he cannot tie a flooding event to a specific level in the river to get through any breach because, again, he doesn't know how deep that breach might have been, how far it was up above the river, etcetera.

So I will leave that there, Your Honor, because Pardue relies on Bedient, because Bedient falls out -- their evidence of daily release falls out, as well. At most they've got the possibility of a release, no documented evidence of any particular release.

MR. REASONER: And, Your Honor, if I might, Waste Management of Texas joins this motion. I think if the Court would think about it, all of us would agree if we were talking about three days, four days, five days, we would be in a trial and we would be scrutinizing, "Okay. What happened on this day? What is the evidence of a release?" You know, we would be scrutinizing all of the particular finite number of days they were talking about.

At what point do we say, "Okay. Gosh, there's so many days here, we're just going to relax the standard" because that's, in effect, what they're

arguing here, Your Honor. They're saying "We have sued you for such an incredibly long period of time that it would be impossible for us to show a release on each of those particular days, so we are going to say that the opportunity for release is enough."

That turns the law on its head. They are here with a burden to show a release on each of these days; and the fact that they have gone back in time some ridiculous time period does not reduce, minimize, or eliminate their burden. They can't show it, and an opportunity for release is not enough.

Thank you, Your Honor.

MS. HINTON: Your Honor, MIMC also joins in that motion for instructed verdict on the release issue and incorporates the arguments of counsel for International Paper and Waste Management of Texas.

THE COURT: Thank you.

MR. WOTRING: Turn to Slide No. 19.

Let's walk through the evidence that we think is presented in the record as the case stands that is much more than a scintilla of evidence and requires a denial of defendants' motions for directed verdict.

Starting with the next slide, No. 20, this is an excerpt from the transcript on October 22nd at Page 34. It is International Paper's corporate

representative, Philip Slowiak. The question is: "International Paper understands that the 2,3,7,8-TCDD at issue at this site came from the Pasadena Champion Mill, isn't that correct?"

His answer was an unequivocal "Yes."

Moving on, Dr. Pardue in the discussion, this is a reminder about the record discussion about the concentrations of dioxin immediately above the impoundments that we had with Dr. Pardue, based upon a couple of the graph readings from the RI/FS study.

So the first record excerpt would be Dr. Pardue on October 17th, 2014 on Page 154, where Dr. Pardue testified:

"So the concentrations immediately above the impoundments is a hundred times higher than they were elsewhere in the river."

And his second excerpt is, he stated "They found very elevated concentrations of dioxin still in contact with the water that was within the waste," and he's talking about when they did the study. This is also for his opinions that if water is in contact with the surface of the impoundments, then dioxin is being released.

The second transcript cite is to the October 17th transcript at Page 162. Moving on about

the specific testimony and evidence, again as background and foundation for the expert's opinions in this, there was substantial testimony about the erosion of the berms surrounding the impoundments starting with Page 126 of the record where -- Slide 23. Dr. Pardue's testimony that, "Whenever the river water would hit it," talking about the berms, back to the quote, "you know, they come in contact with rainwater, for example, you would get this erosion process."

Further evidence was in talking about the breach in the berms starting with the aerial photographs on February 14th, 1973 on Page 158 of the October 21st transcript where Dr. Pardue testifies: "Okay. And did you see any records or documents indicating that there was any maintenance or inspection of the impoundments from February 15th, 1973 through March 30th of 2008?"

The answer was: "I did not, end quotes.

I think at this stage of the record that's probably undisputed and will remain undisputed that from February 15th of 1973 through March 30th of 2008, which is now the penalty period, there was no ongoing maintenance of the berms; and, therefore, the breach that you see on February 15th, 1973 would have continued throughout that period of time.

It was, as the next slide states -- or as

Dr. Bedient stated on October 23rd, 2014 on Page 33 of the transcript, that that was not a condition that, as he put it, quote, I don't believe it's going to heal itself, end quotes.

Now go to Slide 25. Further testimony from Dr. Bedient on October 23rd of the transcript at Page 32:

"You saw the breach in the impoundments on this figure from 1973, correct?"

His answer was: "Yes."

The next question: "And are you aware of any information that there was maintenance of these levees and berms from 1973 on through the end of the penalty period in 2008?

"I have seen no evidence in anything that I have looked at in any of the documentation."

So moving on to Slide No. 27, Dr. Pardue's testimony in the transcript on Page 129 where he states, quote, Unless they were maintained, unless they were repaired on a regular basis, material would have eroded away and, therefore, we saw what we saw. The water was able to get into the impoundments and they weren't taken care of."

Further foundational support for the expert's opinions is contained on Plaintiffs' Exhibit

No. 861, which I think is the Texas State Department of Health report. In it it says that, "According to 'officials of Champion,'" and I'm on Slide 28, "the 'dried material resembled a cheaper grade of cardboard, such as used in egg cartons." And Dr. Pardue's testimony on this subject, the transcript on October 17th at Page 111 is: "My experience with wet cardboard suggests that, you know, once it gets wet, it becomes more vulnerable to breaking apart or to -- certainly to not keeping the integrity of a layer."

This issue has -- the particular issue involved in this case -- one of the particular issues in this case that has been addressed by a state court, an appellant court, is the *State v. Malone Services Co.*, 853 S.W.2d 82, where it states, "The jury could reasonably infer continual seepage in lieu of credible evidence of a force or event that would have stopped the seepage."

What we have is the existence of a breach in the berm as of February 15th, 1973. The -- I think undisputed and will remain undisputed fact that there was no maintenance or repair of that breach of the berm allowing continual water to be in contact with the surface of that impoundment releasing discharge each and every day thereafter during the -- what we've called the

second time period from February 15th, 1973 on through June 30th of 1989.

Dr. Pardue testified about the existence of the breach in the berm on October 17th. The transcript at Page 107 where he stated, quote, The aerial photograph is the first aerial photograph that we start to see a break in the levee"... Dr. Bedient also testified about this, that the aerial -- "1973 aerial photograph clearly shows, for the first time a breach in the berm or in the levee on the eastern side of the impoundments."

Dr. Pardue testified further on Page 159 of the October -- October 22nd -- Dr. Pardue further testified on Page 159, I think of the October 22nd transcript, that "I believe that, based on my detailed assessment and my analysis of aerial photographs into the future from '73 onward all the way into the 2000's, the breach was there and it stayed there and it enlarged through time. And submerged, it appeared to be larger; and it was always there in every single photograph, every single one that I looked at from 1973 forward."

With regard to the particular mechanisms of release, Dr. Pardue discussed that on October 17th in the transcript at Page 153, he identified the release mechanisms for dioxin of the sludge as being particles

dissolved into the water column, itself, and the colloids transport of dioxin.

Then on October 17th of the transcript at Page 153, Dr. Pardue testified, and this is a quote, "Do you believe those mechanisms were at large every day from the period of that photograph in 1973 through March 30th of 2008?

"ANSWER: As long as there was water in contact with the surface of the waste, those mechanisms are happening."

He was also asked on Page 148 of the October 21st transcript: "Dr. Pardue, do you have an opinion, based upon reasonable scientific certainty, on whether there were daily releases from the impoundment from February 15th, 1973 through March 30th of 2008?"

His answer was: "I do."

The next question is: "What is that opinion, sir?"

The answer was, quote, That there were daily releases from the impoundments during that time period."

Slide 35 is Dr. Bedient's testimony on this very issue contained in the transcript on October 23rd at Page 87, Line 22 through 88, Line 16. He also confirms that, based upon reasonable scientific

certainty, that there was a release every day or, as I'll put in the record, "Okay," the first question -- "To some, based upon the information you have reviewed in this matter, the aerial photographs and the survey and the other information, do you have an opinion, based upon reasonable scientific certainty, about whether there was water in communication with the pits every day from February 15th, 1973 through March 30th of 2008?"

His answer was: "I do have an opinion."

The next question is: "And what is that opinion?"

And his answer was: "My opinion still stands, as it always has been, that the evidence, the aerial photos, proximity to the river, all the things I've reviewed, all the documents. My finding is that within reasonable scientific probability, there was transport each and every day."

The next question: "Okay. And you heard Dr. Pardue's opinion about if there was water in connection with the surface of the impoundments, there would be dioxin being released every day?"

His answer was: "Yes."

We can go on to daily releases from what we call the third period, and again for purposes of the record and the motion to dismiss stage of the trial, we

talked about the first period being from September 1st, 1967 through February 14th of 1973. Previous rulings of the Court had excluded testimony regarding that initial period. The second period that we've talked about is from February 15th, 1973 on through June 30th of 1989.

And the third period, the one period we're talking about now, is what we'll refer to as the third period for ease of reference is July 1st, 1989 through the end of the penalty period on March 30th of 2008.

During that period of time we had plaintiffs' survey, which is Plaintiffs' Exhibit No. 1005, which is in evidence showing that at least parts of all three of the pits are inundated by July 1st, 1989. That is Slide 37. A picture of that is contained on Slide 38, which we've reviewed in the trial.

Dr. Bedient testified about that particular issue on October 23rd of the transcript at Page 86, Lines 7 through 19. I don't think I need to read those into the record. Briefly, his opinion was that portions of all three of the pits were inundated, including a portion of the western impoundment. The two eastern impoundments, he testified, were underwater and that there was a portion of the western impoundment that was submerged underwater at the same time, resulting in

three separate releases each and every day after that day.

Or to sum it up, on Page -- Slide 40, Dr. Pardue testified on October 17th of 2014, the transcript at Page 105 is "My opinion is that most of the pit area, certainly pits 2 and 3, were completely submerged by July 1st, 1989."

Further evidence of releases from the third period of time, July 1st, 1989 through March 30th of 2008, "Every aerial photograph between July 1st, 1989 and March 30th, 2008 shows pits 2 and 3 underwater." That's from the transcript on October 17th, Page 105.

Dr. Bedient testified on October 22nd of the transcript on Page 163, "The aerial photographs clearly show significant submergence and inundation post 1989." He testified also that "much of the eastern" -- I'm looking at Slide 42 -- "much of the eastern side by 1989, the Summer of '89, is completely and totally submerged at a condition of mean high tide" and that as a result, Slide 43, looking at Dr. Bedient's testimony for the transcript at -- on October 22nd at Page 161, "Once the pits are inundated, there is daily release of dioxin."

And the quote from Dr. Bedient: "For every day thereafter going forward in time, there is no

question in my mind that there were releases of dioxin coming out of these pits. They're in direct connection now, inundation from the river on a daily basis."

Dr. Pardue also testified on the transcript, Page 153 on October 17th:

"QUESTION: Do you believe those mechanisms were at large every day from the period of that photograph in 1973 through March 30th of 2008?

"ANSWER: As long as there was water in contact with the surface of the waste, those mechanisms are happening."

Further testimony about the daily releases during a third period of time, July 1st, 1989 through March 30th, 2008 is contained on the transcript as put up on Slide 45. October 21st, the transcript, Page 148, Lines 10 through 17, Dr. Pardue testifying about daily releases from the impoundment.

That concludes our presentation on the daily releases during the second and third time periods. The issues raised by counsel for the defendants addressed a couple of issues. One, that there are just too many days here and we need to go back and scrutinize every day. The requirement is for Harris County to come forward with evidence sufficient to meet the -- sufficient to meet a scintilla of the evidence. We

believe we have done that in connection with showing a daily release from period 2 and period 3 and certainly by the time we send this case to the jury, we will have submitted more than a preponderance of the evidence on the particular issue, justifying a verdict for Harris County for a daily release from February 15th, 1973 through March 30th of 2008.

To the extent there's questions about how we can know for certainty, that's not required in the law. Our experts testified, based upon reasonable scientific probability, about daily releases and that's all that is sufficient and certainly more than justified in getting past the directed verdict stage of this trial.

THE COURT: Thank you.

MR. STANFIELD: Your Honor, let me address how I think it's best to kind of piggyback off of what the County just said. First, I do think we should break these into the two time periods, February 15th, '73 through July 1, '89.

Second, I think we can take the different mechanisms as they've been laid out. There's dissolving or partitioning in the water. There's particles getting in the water, which I understand to be the material eroding into the water; and there's colloidal transport.

And then finally, I'm not going to hit cause, suffer and allow fully because that's the next directed verdict that will address that.

Let me start with the *Malone* case briefly. The *Malone* case, if memory is serving, was an underground storage tank case where there had been a documented -- I'm sorry -- "Where there had been a documented release and then after that seepage, which is not in this case, but still after seepage had been documented, then it went forward in that case and said, "Okay. Well, there's nothing to say that it stopped."

The other case that the State has cited is the *City of Greenville* case, which relates to a landfill, where there was an affirmative duty to put 2 feet of soil cover on and over time it was documented, "We're just never seeing that soil cover put on." That is a different case from here, where rather than -- there's no regulation that we omitted to follow such as putting soil cover on. The allegation here is that we affirmatively cause, suffer and allow or permitted a release or discharge on a particular day. So the *Greenville* case doesn't help.

The best case they have is *Malone*, but that is a different factual scenario and introduces -- really the problem here to using that kind of thinking with

this case, because we never have a documented start date for release in this case, where there's an actual documented release.

The most we get from Drs. Pardue and Bedient is that in their mind, the conditions exist to make it possible for a release to occur, but we don't have a documented release ever occurring to start that *Malone* clock, which is why what Mr. Reasoner said is absolutely correct; and I know Ms. Hinton would have said it as well, had it not already been said, which is you cannot reduce the County burden of proof here at all. They have to have a documented release date on a mechanism that would continue to occur, absent some other thing happening.

So this is not the *Malone* case. The County has no evidence of releases, whatsoever, from the cite that the defendants here caused, suffered, allowed or permitted. Let me start with the quote from Mr. Slowiak where he was asked -- and it was a question from the UAO, but he was asked whether we agreed that the TCDD at the Site came from the mill.

He said, "Yes. The 2,3,7,8-TCDD located at the Site, still contained at the Site within the waste material, is from the mill." That's not controversial and it's not evidence of anything.

Furthermore, when Dr. Pardue started to testify, "Well, when you take a filter sample from above the Site, I see elevated levels of dioxin." He did not do a fingerprinting analysis to tie it to the specific waste. And as we know in this case, in fact, looking at the Charge that he used in front of the jury, was there was dioxin both north and south of this site and there are many sources of dioxin, but they're not fingerprinted to the site. That is not a scintilla of evidence to say that these defendants caused, suffered, allowed or permitted any discharge of dioxin from the site simply because you get a spiked reading there.

You would have to fingerprint it to the site, and then you would have to tie that to something that the defendants caused, suffered, permitted or allowed.

And that -- by the way, that does relate to the dredging evidence that has come forward in this case so far, which is that dredging is something that the defendants did not do and is something that would cause a release.

Your Honor, in the taking on the sample that Dr. Pardue talked about, that, of course, was a sample taken within the waste, itself, within the waste. It was an unfiltered sample when a piezometer was

slammed into it, hammered into the waste, showing you how strong it is, and then they take a sample out and say, "Well, we have an elevated reading of dioxin that triggers in this waste." That's no evidence of it being discharged or released at all. So they don't have evidence there.

Where we get to in the '73 to '89 time period is they have to -- they absolutely have to -- Pardue relies on Bedient totally for this -- they have to have water contact with the waste. At most that might get you the dissolved phase, because we don't have a scour velocity, Your Honor, whatsoever, to get to the particles getting out; and we don't have any evidence of colloidal transfer.

But from '73 to '89 there is no evidence of water contact with the waste because the Highway 90 gauge data is totally out of this case, period. Tidal action is totally out of this case prior to July 1, 1989. So we don't have flooding, we don't have tides. The best they might be able to do is if they can line up photographs between '73 and July 1, 1989, and prove that there was water exchange between the river and the interior of the pit.

But they can't get there because they cannot prove what the depth of any alleged breach is;

and, thus, they cannot prove that there was actual exchange within or without the pit. As we've talked about in this case, that eastern impoundment was a place to collect water during the operation and is a place that could have collected rainwater; but they have the burden to prove that that is actual exchange in the river. So prior to '89 goes out the window.

In terms of post '89 where they have some evidence of inundation, what Dr. Pardue actually talked about, when he talked about the material getting into the river, and this was on their slide deck, is that he believes that there is a potential that that material could be subject to erosion. He believes that if it were like cardboard, that that would, quote, suggest to him that it would be, quote, vulnerable to breaking apart into the river.

That is no evidence, whatsoever. No evidence, whatsoever, to say that "If this is like cardboard, that I believe, taking that assumption, it would be vulnerable and would suggest to me that it would break apart." So, consequently, the material getting into the river, itself, is out; and we don't have evidence that it's ever dissolved into the water column because there's no fingerprint analysis. Neither do we have analysis that the colloidal transfer is going

on.

Your Honor, one of the other things they pointed you to is where they got Pardue to give what I'll call the penultimate opinion; and this was on Slide 34 of their deck where they were citing to October 21st. Dr. Pardue was simply asked:

"QUESTION: Dr. Pardue, do you have an opinion, based upon reasonable scientific certainty, on whether there were daily releases from the impoundment from February 15th, 1973 through March 30th of 2008?

"ANSWER: I do.

"QUESTION: What is that opinion, sir?

"ANSWER: That there were daily releases from the impoundments during that time period."

That is classic ipse dixit. You have to tie it back. And when we actually start to dissect his specific opinions to see what he can tie back to where, it totally falls apart. It's easy to get that answer to the question when your own lawyer asks it of you; but when you start to break down the time periods, break down the transport mechanisms, suddenly we don't get there. We don't have the material getting into the river. We don't have any analysis to show that this dioxin ever got out of the waste into the water column, or that any colloid got out into the water column.

There's just no evidence there.

And, of course, Bedient is not a dioxin expert at all and he cannot offer this jury or you any evidence to say, "Well, I agree that dioxin got out." To use a phrase that Mr. Carter coined yesterday about the talking twins, only one head of the talking twins can speak to dioxin. That's Pardue, who relies entirely on the other head, Bedient, to give him some water connection.

And Pardue agreed with that because he said, "Well, you would have to have water and contact." So that definitely kicks out prior to '89, and we just don't have the scientific support after '89 to say that anything was getting into the water from this site that the defendants caused, suffered, allowed or permitted under any of the statutes.

THE COURT: Give me just a second and then I'll let you respond again, Mr. Wotring.

(Off the record)

THE COURT: We're back on the record. Mr. Reasoner, why don't you follow up and then I'll let you respond, Mr. Wotring.

MS. HINTON: Then I need to join.

THE COURT: I understand. Off the record for just a second.

(Discussion off the record)

THE COURT: So we're back on the record. Mr. Reasoner.

MR. REASONER: Yes, Your Honor. Thank you. Just to follow up very briefly on Mr. Stanfield's point, this Court at this stage of the proceeding is to take their evidence in a light most favorable. It is -- the Court is not required to accept sweeping conclusory statements as true, okay. That's clear under the law.

And what you have from Dr. Bedient and Dr. Pardue in their statements, "Did you find a release every day?

"Yes."

Those are conclusory statements. The Court at this stage is to look at what the actual evidence is; and when you do that, giving them the best of it, you know, looking at it most favorably to them, you have testimony from Pardue and Bedient that there is an opportunity for release. We're not saying we agree with it, but they're saying there is an opportunity for release during both of these relevant time periods.

That's giving them the best of this evidence and not considering conclusory statements that are not evidence. And when you look at it in that light, Your Honor, and you apply the standard, which is

not relaxed in any way, given the fact that just because they have a great number of days, a directed verdict is appropriate on the daily release issue.

THE COURT: Thank you. Ms. Hinton.

MS. HINTON: Your Honor, for the record, MIMC joins in IP's motion for directed verdict on this point, as well as the arguments of IP and Waste Management of Texas.

THE COURT: Thank you.

Mr. Wotring, in your response could you address what the evidence is, other than the ultimate conclusion given by the experts of daily contact with the river from February 15th, 1973 to July 1st, 1989?

MR. WOTRING: The evidence is, number one, the ongoing breach in the berm throughout that period of time. I don't think that's contested or will be contested.

The fact there was a breach in the berm and allowed the water to be in communication between the inside of the eastern impoundments, plural, and the river, I think, is the evidence established by Dr. Pardue and by Dr. Bedient. And as a result, because of that connection between the river and the inside of the impoundments, there would have been a release of dioxin during that period of time.

THE COURT: One of their arguments is that even with the breach, there has to be evidence of what the level of the water is in order for it to be in contact with the waste in the impoundment and that we don't have that. That's one of their arguments.

MR. WOTRING: That is one of their arguments. I don't believe they have the evidence -- evidentiary support to support that particular argument.

What Dr. Bedient testified about was the existence of the berm, that he saw the water of the river in constant communication between the inside and the outside of the eastern impoundments throughout that period of time.

And if you go back to the *Malone* case, which was a pits case that had to do with constant discharges to the groundwater, if memory serves, and that if you saw constant communication between the groundwater, the jury could infer ongoing seepage. In this case, instead of communication with groundwater, it's communication with the surface water through that ongoing breach on a daily basis.

THE COURT: So you believe that the triggering mechanism for purposes of *Malone* is the picture of the breach showing water connecting to the impoundment?

MR. WOTRING: That's the start of it. Then following up with the aerial photographs throughout the early period of time showing that there was ongoing communication and that that berm would never have healed itself, I think, is the most apt analogy throughout the entire period of time for the eastern impoundments.

We're getting into the actual release for the Texas Water Pollution Control -- what we've been calling the "General Prohibition"; and different statutes, the Spill Act, the Solid Waste Disposal Act don't always require an actual release. Sometimes it's an eminent threat of harm -- sorry, eminent threat of discharge adjacent to erecting eminent.

We can go through the specific statutes and apply it differently, but I think that for our purposes, Harris County has established there was an actual release from the eastern impoundment, certainly from the period we've been calling Period No. 2 and that Dr. Bedient's testimony is sufficient to establish that for every day based upon a reasonable scientific probability and a preponderance of the evidence standard.

Of course, at this stage we're not dealing with preponderance of the evidence. We're dealing with more than a scintilla of evidence. So that is our

evidence on that particular point.

THE COURT: Okay.

MR. WOTRING: Touching upon some of the other issues that counsel for defendant had raised, we would go back to the *Malone* case again. It is a pits case and it is talking about a release downward as opposed to out the side. But we think the analogy is apt and that given the state of this record and that there is going to be, I don't believe, any evidence of any repair of the berms, certainly not at this stage of the proceeding has there been any evidence of a repair of the berms, and that that would have been an ongoing release and then certainly through the period of time in which the western part of the -- or the eastern part of the western impoundment and the two eastern impoundments would have been submerged, that would have been sufficient for a daily release throughout that period of time.

To sum Dr. Pardue and Dr. Bedient, I don't think they felt -- and I don't know -- they certainly did not feel that the issue about on ongoing release after the July 1st submergence date was really a tough issue or an issue that was really that much subject to question; and at this stage in the proceeding, I don't believe there has been much question about that during

the period of time in which they were inundated by the river, there would have been ongoing releases.

So they talked about at this stage of the proceeding the Court should construe the evidence most favorable to Harris County. We believe that is the standard. What we have put into this record right now in responding to the motion for directed verdict are some of the foundational facts that support our experts' opinions. And then we have put the ultimate opinions.

To respond to their motion for directed verdict in any other way would require us to put the entirety of the record in this response to motion for directed verdict, which we don't think is required.

The quotations from our experts that we have put in the record in response to the motion for directed verdict are based upon their foundational work. That foundational work is described in their testimony from the stand as sufficient to support the conclusions that they have reached in this case, which is that there are ongoing daily releases from February 15th, 1973 through March 30th of 2008.

I guess with regard to a couple other specific points, there is an issue about whether all of the dioxin could have been released via a dredging mechanism, which I think counsel in questioning with our

experts suggested happened in the '70s or the '90s. Depending on either the '70s or the '90s, if dredging were another mechanism for release, it would be Harris County's opinion that defendants are still responsible for that and that would still fall within the common practice language of the general prohibition and the other two statutes that -- under which it has sued. So approving its dredging does not absolve them of legal liability for the ongoing releases; and at this stage of the proceeding, I think all that has been done.

THE COURT: Your point is that even if the dredging wasn't their responsibility, they would have a responsibility to do something in response to the dredging?

MR. WOTRING: Exactly. And that they cannot escape liability for the release of dioxin into the San Jacinto River because somebody else dredged into it, given the circumstances of this case, which indeed has been puzzling to us why they would attempt there was ongoing releases from a third party because under our view of the law, we don't think that absolves them.

So that wouldn't excuse their conduct, wouldn't absolve them for liability under the liability statutes we've sued them. It might provide some limited defense under some limited circumstances, but certainly

not absolve them from daily releases caused by dioxin. I think -- we don't have to forecast what is going to happen when they put their experts on the stand for that particular issue.

Just a couple of the specific points that they have brought up. Slowiak was talking about the 2,3,7,8-TCDD at the Site. The Site is defined in that deposition. I may be wrong about this. I think it was the EPA's definition of the Site, which is broader than just the impoundments. That's a minor point.

The other point that has been raised is whether Pardue needed to do fingerprinting for the waste before he can offer his opinions. I don't think that's supported by the evidence and certainly not at this stage of the proceeding, that Pardue would have to do fingerprinting to testify that there had been ongoing releases on a daily basis from the impoundments.

The significance of his testimony about finding dioxin in the layer where the waste is contained is the fact that it has been defendants' contention that dioxin is so hydrophobic that it will never get dissolved in water. That test actually refutes that theory, and we see that many years after the waste was deposited there, that it is still -- has water inside the layer of the waste and that water inside the layer

of the paper mill sludge, even many decades later, still has significant amounts of 2,3,7,8-TCDD.

If memory serves, that was the reading that showed there were 2,700 parts per picogram per liter, I think, was the significance of that reading, showing that dioxin from the paper mill sludge would dissolve into the water either on the colloids or the suspended solids phase of the water inside the waste level.

Your Honor, I think that responds to all the specific points that have been raised. One minor point I would say is that I'm not going to buy in and accept this idea that Dr. Pardue and Dr. Bedient are somehow talking twins. They are not and do not testify as a predominant area of their living or their occupation. They are noted and reputable professors.

Dr. Bedient has done significant work for our community at Rice University. Dr. Pardue in his stead has done significant work at LSU. And I'm not going to accept this idea that they're somehow talking twins.

And I would note for the record and for them that even their own expert, Defendants' own expert, Dr. Adriaens, has recognized Dr. Pardue's reputation and his quality of his science in this matter. So every time they want to say "the talking twins," they're going

to hear me say something in response to it; and if we need to go further down that line, I'll start reading their CV's and the records of their service, which I believe is unmatched by the Defendants' experts.

THE COURT: And you're referencing also Dr. Pardue working on the Passaic River?

MR. WOTRING: Exactly so.

THE COURT: All right.

MR. STANFIELD: Let me address *Malone* real quick. Just to be clear, we just -- *Malone* is not a Supreme Court of Texas opinion. We don't believe it's binding in this case. *Malone* relied in part in reaching its conclusion on the *Pet Foods case, not the Best Foods* case, but the *Pet Foods* case in the Supreme Court of Texas which talked about air emission discharges.

And in that case --

THE COURT: Could you give me a minute? This is the lady with regard to the juror.

(After a break, the following was had:)

THE COURT: We are back on the record.

MR. STANFIELD: Just picking up where we left off briefly, I just wanted to note that we believe, and this is going to come into the Charge conference, that the *Pet Foods* opinion from the Supreme Court of Texas we think implicates how the jury should be

charged. That is an opinion on which the *Malone* case rests in part on a misreading of the *Pet Foods* decision as to how you charge a jury and what the evidence is needed of daily releases.

In any event, just to circle back to what Bedient actually testified when it comes to this breach is that he stated, and this is on October 23rd of his trial testimony, that he only believes the opportunity would be there as a result of the breach were exchanged on that day and went on to state that he did not know the exact elevation of water and all of that on that particular day. I -- I don't know. And so he could not get an exchange of water opinion, and that is what Dr. Pardue rests on.

I do want to note, as well, Your Honor, in terms of the new theory which we've heard today about now an emanate threat of discharge, that is an unpleaded theory. We have not tried it on consent. We object to it, just as we object to this new theory about some sort of scheme that would give rise to liability out of the statute. Conspiracy is out of this case. It's been out of this case.

There is an enormous problem with the shifting sands of the governmental theory coming from Harris County and at times supported by TCEQ as to how

they can hold us liable. They pleaded a theory that on each and every day of the penalty period, a release was caused. Now we're hearing a different theory about some sort of emanant threat that may come under one or more of the three statutes. That is unpleaded. It has not been tried by consent. They have no evidence of that. We object to it. Similar on some unknown scheme.

And, Your Honor, frankly, this gets to a larger problem and it's something that Mr. Benedict said, and Mr. Wotring followed up on it when he talked about, "Well, let's look at the circumstances of this case and there is no bright line." That is an enormous problem, Your Honor. A statutory theory has to be put forward that is neither vague nor overbroad and is easily understandable by every day Texans.

These statutes apply to everyone in this state. We are all entitled to be on notice as to what conduct is regulated and when you violate the statute. What has been put forward by the government in this case, both on the state and the local level, is that you have no idea whether or not you're in violation of the statute unless and until they decide to tell you you are in violation by bringing a lawsuit, which, of course, now they state you don't have to be on notice of a violation, you don't have to be given any opportunity to

respond to a notice of violation, none of that.

And that is an absurd unconstitutional reading of the statutes. They have to have a certain definite meaning that people can understand what conduct is being regulated. And so that is a general point and a specific point to this case is we are not trying extra issues by consent. They are stuck with their pleading. They don't have the evidence of a daily release. At most they have an opportunity. That is not going to be enough.

And just another point. Frankly, I don't care what Dr. Bedient or Dr. Pardue felt about their testimony or felt about a possible release, and neither should anybody else. The fact of the matter is they have to offer competent expert testimony that, in fact, there was something beyond a mere possibility of colloidal or dissolving transport or material getting into the water. They don't have that.

Unlike the *Malone* case, we do not have any date certain as to when these releases actually occurred; and that is why fingerprinting is important because it is in evidence in this case that there are many sources of dioxin. It is in evidence in this case that there were readings up and down the river, including the surface water over their site.

There is no evidence that that dioxin came from this site. We have to be held liable for what we allegedly did, which is also why dredging cannot be attributable to us, and we'll get into this if we're allowed.

Of course, we have a third-party negligence defense in this case. It is still part of this case. We're not held liable for that. So let's stay focused on the specific issue here, which is not this wide-ranging issue. It's Pardue and Bedient introduced actual evidence of actual releases from this site of the TCDD from the Pasadena mill. The answer to that is "no." They have found some dioxin in the river, period. They have found some dioxin within the waste material in the pit that had not been released, period.

MS. HINTON: Your Honor, MIMC would join in counsel for IP's argument that we do not consent to trial on any theory, emanant threat of discharge, or this new theory as a scheme. So we would object and note for the record that we are not agreeing to try by consent these new theories that have not been pled.

MR. REASONER: Your Honor, Waste Management of Texas joins in the argument of both these counsel. I would just note again, the admission of impossibility of identifying a release on a particular day is fatal to

their argument here and they have given no basis for altering their evidentiary burden. Also as to dredging, we -- just to note for the record, we believe that absolutely goes to causation and whether any penalty is appropriate in a circumstance where a third party causes the release. So, thank you.

THE COURT: Thank you.

Mr. Wotring, anything further?

MR. WOTRING: No. Frankly, I think the evidence stands for itself and so does our argument.

THE COURT: Let's move on to the next motion.

MR. STANFIELD: Your Honor, International Paper moves for a directed verdict on the basis that it -- that neither it nor Champion caused, suffered, allowed or permitted a violation. It is undisputed in this case that control is key.

Jen, can you take me to Slide -- never mind. I'm there.

Undisputed that control is key to this case.

Your Honor, in opening statement counsel for Harris County stated, "They just have to have the power to stop the sludge from getting into the river." That's a statement made to the jury. That is also in

line with the argument made in summary judgment by Harris County that you have to have the right or power to stop the discharge. Control is key to this case, and control is something that Champion and IP were lacking.

Your Honor, you raised a great question yesterday at the end of the day which has never been answered by government lawyers, either for the County or the State, which is: When does ownership of waste end? Does it ever end? Can it ever end? You have never gotten an answer to that question. Neither have we.

But the reality is that it does end and there are two ways it can end, which we've talked about briefly. One is under the common law rule, just kind of a waste law that it ends when you hand your waste over either at the point of collection or the point of deposition into the landfill; or second, under Texas fixture law.

We've covered all of that, but it is important to circle back to the point that you raise, which is, can you ever get rid of your waste under the governmental theories that are being put forward by the local and state government in this case?

And under their theory you cannot and that is overbroad, and that's not something that every day Texans, whether on the corporate or the personal level,

are aware of. And it gives rise really to unbridled, unlimited liability because under that theory, for example, if back in the '60s you had changed the oil in your car and say it was permissible to put it out in a can on the street corner, gets delivered to a landfill at the time that's owned, operated by someone else, land owned by someone else, government approved, it leaks years later and anybody who put oil or whatever it may be, maybe paint cans with lead paint in them at the time and you've got discharge now, you could be liable for $25,000 a day.

That's not what the law is. You have to have control, the right or power to stop the discharge at the Site. Here, Champion and IP lack such control at the time of the discharges.

And again, it is important to have a time element here because whether we start in 1973 with the general discharge statute, 1975 with the Solid Waste Disposal Act, or 1985 with the Spill Act, neither Champion nor IP had the right or power to stop any alleged discharge at the Site.

This Court has already ruled that we lacked contractual control over MIMC who, as you know, we don't contend owned the Site. This Court has already ruled they are not record title. It would have been Virgil

McGinnes. It goes back to the landowner. We never had contractual control over Virgil. But to the extent that McGinnes could have exercised control, I don't know what that could have been. To the extent they could have been, we, Champion, or IP, certainly had no contractual control at the time of the discharges. The Court has ruled that.

And consequently, we can't be liable for any conduct of any other defendant in this case. And there's no other basis for control, other than potential ownership of the waste, which, as we've talked about already, even if we did own the waste, which we dispute, even if we did, at best it would have been affirmatively unlawful for us to enter upon the land of another, take bulldozers or whatever else it would have been to try to excavate it out. We did not have the right and the power to do so.

The best that we have heard from the government side of this case is that maybe we could have made a phone call, maybe we could have written a letter. That is the right or power maybe to make a phone call or a letter. That is not right or power to stop the release. And that is exactly how the County's attorneys framed it to the jury in opening, which is correct. They have to have had the power to stop the sludge from

entering the river. We didn't have that.

We talked about this briefly, Your Honor, on Friday when we were off the record. We were discussing this issue, as you remember, and then all of a sudden this new theory of scheming came up. And I say it's new in the sense that it's never been pleaded outside of the conspiracy claim, which is out of this case.

We object to this. We're not going to try this by consent. We have not tried it by consent. But in any event, it's totally unclear what that theory would be and how it would give rise to liability under the statutes -- under the statutes.

Of course, there is no evidence of some untoward scheme. To the extent there is evidence that there was cooperation to put the material in the landfill, that is not in dispute. The County has said that's not in dispute. Of course, all of the parties in this room, other than Waste Management of Texas, who did not exist, were fully involved in that purported scheme. Even TCEQ's predecessor did an investigation of the Site, never brought charges, never said to shut down the operation or to remove the material.

Now, to the extent there was a scheme, it would have had to have been in place; and it's not

actionable. It would have had to have been in place during the penalty period. There's no evidence of that. We object to this new theory.

Your Honor, we've been through the evidence of what actually happened at the time -- what actually happened when Champion may have had some control. Nothing untoward happened. Dr. Quebedeaux was totally involved. And so, consequently, that can't be any basis for our liability, what we did at the time.

When you look at the penalty period, we don't have the right or power to control. So that knocked out the general discharge statute and the Solid Waste Disposal Act.

Harris County has also raised the prospect that we "caused, suffered, allowed, or permitted" MIMC as the owner/operator of the facility to violate the Spill Act. Again, Your Honor, that depends on a right of control that did not exist at the time of the violation.

I'll just run through these quickly. On the Solid Waste Disposal Act, you know that we have a fundamental disagreement with how that works. Nonetheless, nonetheless, our activity needed to occur during the course of the statute. Nothing we did was in effect during the course of the statute. Nothing we

could have controlled. That operative rule went into effect in '75. There is no retroactive application of it, and the way the Solid Waste Disposal Act works is that we had to have conducted a disposal operation in such a manner as to cause a problem. That didn't happen in '75 or afterwards.

We've been through some of these arguments before, and we would just reurge that the passive migration theory that was put forward by TCEQ as part of the *Phenyl Oil* (phonetic) decision, we think that that is not a reasonable reading and should not be accepted. It's further in conflict with actual case law on the subject.

In terms of the Spill Act and what we could be liable for, we disagree that we could have caused, suffered, permitted or allowed. We also disagree that as a fundamental element of that claim that the harmful quantities has been met there.

The Court made a ruling that you agreed with TCEQ's reading of the statute. It's a little unclear to me, personally, which reading you accepted because I think they offered two. One was that you don't ever have to show a harmful quantity because of use of the phrase "those substances" in the statute. We don't think that's a reasonable reading of the statute,

Your Honor, because then that leaves out the prior clause.

And take into absurdity, which any statute could and, as you know, we would submit this case as an example of that, that presumably then -- let's say gasoline is a hazardous substance. You could be filling your boat out on the dock, drop a drop of gasoline in and have liability under the Spill Act and have to take some specific action of liability.

That's not reasonable, Your Honor. We think that the most reasonable reading is that you have to have a harmful quantity of hazardous substance proved on every day on which you were seeking that violation. They don't have any evidence of that because, as we've talked about, the EPA has never specified that amount.

You've already rejected the view that the 1 pound applies and, even if it didn't, that couldn't be met here. But this is where we talk about the fact that we disagree with the State's reading of the Spill Act.

And just briefly, Your Honor, just to remind you, Dr. Pardue has explicitly testified during trial that he has no opinion about the amount or the source of dioxin in the San Jacinto River. That goes to the general lack of proof that's specifically under the Spill Act, as well. He testified to that on October 21.

Dr. Bedient similarly stated on October 23rd he's not giving any calculations.

And, Your Honor, to the extent that this particular argument about the Unilateral Administrative Order is the TCEQ argument the Court was relying on, we understood that they were arguing perhaps that the Court could rely on a Unilateral Administrative Order to establish that a harmful quantity got out. Of course, that doesn't particularize to any day. It doesn't particularize any day within the penalty period and is not in evidence in this case and so cannot defeat a directed verdict.

And, Your Honor, I will stop there because my next point is attorney's fees.

MR. ROSS: Your Honor, on behalf of Waste Management of Texas, much of this last motion is unique to IP, and so we will leave it at that.

Waste Management of Texas would respectfully join the motion to the extent it bears on the harmful quantities issue in the Texas Spill Act and we will respectfully wait our turn to make the rest of our presentation on the Spill Act. We have our own unique arguments.

THE COURT: Thank you, Mr. Ross.

MS. HINTON: And MIMC joins in that same

portion of IP's argument and we'll also have additional items during our presentation.

THE COURT: All right. Response.

MR. WOTRING: In response, we didn't start this morning with the response to the Court's question of last evening because we started dealing with the how are we going to handle the stipulation with respect to some statements made in opening argument.

The Court's question was about the extent of Champion's liability for the sludge it produced, the sludge it hired somebody to take away, the sludge it recognized as being its own, in the possessive tense, both in 1965 and then later, we would argue, at the deposition of its corporate representative all the way in 2014.

Given the circumstances in this case, and I think we will limit our comments on behalf of Harris County. I'll limit my comments to the circumstances of this case; yes, we would argue that Champion's liability for the sludge would extend to the end of the penalty period. The Court inquired about whether it would extend until today. My only hesitation about getting into the post-penalty period is because of the ongoing Superfund process, and I don't want to be characterized as having -- on behalf of Harris County or otherwise

offered an opinion about whether the Superfund process might affect ownership responsibilities of Champion or the allocation of responsibilities between the different defendants.

THE COURT: To be clear on my question, it was really more of a theoretical one in terms of, if your argument is that they continued to have ownership after they deposited at a site, then when, theoretically, does that ownership end; or is your position that unless they take affirmative steps to transfer ownership, that that ownership continues on ad infinitum.

MR. WOTRING: And perhaps the way to back into the Court's question, with the Court's permission, is to think about a site that has not been involved and has never been involved in a federal Superfund project similar in nature in which Champion deposited its sludge, let's say, in the Pasadena landfill, which was also ongoing. It is not a federal Superfund process because Harris County is not raising federal claims and does not want to interfere with the federal Superfund process in any way, as it's repeatedly argued throughout this case.

Given the circumstances of this case and given the way it was handled by Champion and handled by

MIMC, yes, we would argue it had ongoing responsibility for the sludge they placed at the site that would continue in nature and continue on through the penalty period and on until they did something affirmatively about it.

Now, we are limiting our comments to Champion in this case and these circumstances. I don't think we have to defend paint can analogies, spilling gasoline when you fill up your boat. Those are different cases and different circumstances and incomplete hypotheticals.

But in this case, since they recognized it was their waste, since they recognized both in 1965 and 2014 it was their waste, and they did not contract away the ownership of the sludge, yes, we believe they had ongoing ownership interest in the sludge and that that ownership interest is sufficient to trigger liability under the environmental statutes under which they had been sued.

And to refresh the Court's memory about where ownership stands of the sludge, according to defendants, Champion owned it until they put it on the barge that was owned by MIMC. When it's on the barge owned by MIMC, it's unclear who owned it, according to defendants. There is -- well, you have to pick a

defendant and then they will identify who they think owned it. It's not clear why they think it transferred ownership on the barge because at that point in time, it's in a slippery slurry stage. But once it gets off the barge and it's on the land, it's unclear when, but both defendants think it magically becomes part of Virgil McGinnes' property. It's the -- the period of time when it's on the barge that no defendant can offer a coherent explanation. They certainly can't together offer a coherent explanation as to the ownership of the sludge, itself.

We would put to the Court that's an incoherent theory altogether because it's crafted to try to avoid liability and crafted in such a way that it doesn't make sense and certainly cannot be crafted in such a way to avoid liability under the Texas Water Code and the other statutes under which they have been sued.

We do believe that because of the control that Champion had over its sludge that it can be held liable under the Spill Act and the two environmental statutes. We don't believe that anything we have said in argument in the motion for directed verdict stage is a new theory. We don't believe that any of the discussions we've had about the fact that even if ownership was not an issue, they would still be liable

under the statute is a new theory or that they have any reasonable basis for objecting to the evidence that has already been put into the record without objection about both the nature of the release being into the water or adjacent to the water. Those theories were in our original Charge, or in our discovery responses; and all that evidence has come into the record without objection.

But that's a separate issue. We're at the motion for directed verdict stage, and at this stage the legal matter is there is evidence of Champion's ownership, there is evidence of Champion's contractual right on through the beginning of the Texas Water Code to establish its liability under the general prohibition, the Texas Spill Act, the Solid Waste Disposal Act.

Other than that, I would adopt our legal briefing and authorities in response to the various motions for summary judgment and other motions that International Paper has filed on this particular issue.

THE COURT: Okay. Mr. Stanfield.

MR. STANFIELD: Your Honor, just to be clear, not once during that argument was it identified to you what our right and power to stop the discharge would be on someone else's land, whether McGinnes in his

individual capacity owned the land or whether McGinnes Industrial Maintenance Corporation owned the land or whether the Port of Houston Authority at some point owned the land. It does not matter for purposes of International Paper and Champion because we had no right and no power to stop the sludge material from entering the river at any point in time during the penalty period. That is black letter law. There is nothing magical about it. There is nothing crafted about it. It is simply Texas law that we do not own and have the right and power to act on someone else's real property.

In terms of the fact that transfer to the landowner, there's nothing -- to use the term "magical" or "crafted" about that, either. The dispute about who owned it on the barge is totally irrelevant to this case at this point. It is totally irrelevant. That is not part of the County's theory of any discharge. It's not even in the penalty period.

So we can just throw that out the window. It doesn't matter. We've talked about that in terms of when our ownership ended, but it doesn't matter who picked up ownership at that period because for purposes of our discussion here under black letter Texas law, it became part of the realty, it became the realty owners. That is black letter Texas law starting with the Texas

Supreme Court in the 1800's, moving forward through today.

And, Your Honor, if I were going to stack up the cases in front of you from the Supreme Court of Texas going through what that law is, they would be quite tall. If I took the Court of Appeals' opinion, stacking up fixture law, it would be incredibly tall, as well. And if I took their two opinions, which I submit would go in my piles about asbestos pipe and a carbon monoxide emitting furnace, it would be quite small and even those wouldn't support their opinion because in those cases, when we talk about improving value, those things did not improve the value, but were considered fixtures.

Your Honor, we have to have circumstances that give rise to ongoing liability in the penalty period, and we do not have any of those. We have to have a statutory reading of these statutes that is constitutionally permissible such that we can -- and you in particular in deciding this directed verdict, can establish what gives rise to liability and has it been met based upon this record.

Consequently, talking about under the circumstances of this case is entirely unhelpful, unless and until we get a statutory reading of each statute

that then states "Here are the markers of when liability is triggered." Consequently, I can take the evidence, put it up against those markers and say is liability triggered. The only markers you have are the right and power to control, and there is no evidence that we have it. In fact, the evidence is we did not own the land. We did not control the land. Certainly we did not cause subsidence or control subsidence. We did not cause dredging or control dredging.

In terms of the last point that was made about the contract, there is no dispute. As a matter of law, after 1971, we had no contractual control. No contractual control, whatsoever, that could somehow allow us to exercise a right on this Site and give us the right or power to stop the sludge from entering the river, exactly how the County has framed the issue in this case and with which we would agree with that. We have to have the right or power at the time of the discharge to stop the discharge.

And, of course, we submit that our contract that's relevant to this case ended in 1966, Your Honor.

MR. WOTRING: That's an interesting point, and let me go to that one. The contract can't end in 1966 because the only site that contract could be about, given the evidence in this case, is this existing site

because all other evidence of the Hall's Bayou site has been excluded. What is relevant in the record -- I don't think that's a make or break for the directed verdict, but it's an interesting issue. The only site that contract could be about given the current state of the record is this site, not the Hall's Bayou site.

But back to the point on ownership. We think ownership gave them sufficient control and sufficient nexus under the case law to trigger liability under the environmental statutes. We also think that if they had placed this waste beyond their control after 1967 and thereafter, that they aren't liable under the environment statutes for causing, suffering, allowing, permitting the water of the State of Texas as we have framed it in our -- certainly in our Charge that we've submitted to the Court.

The struggle in this case has been and will continue to be, I think, the Defendants' refusal to accept the fact that cause, suffer, allow, or permit is extremely broad, has remained extremely broad in the law and is sufficiently within the confines of other areas of the law which also have broad phrasing. This, as I think the case law we submitted to the Court, is one of the broadest phrases that you can have imposing liability on people to protect the water of the State of

Texas.

And to the extent we need -- well, I don't think we need to go further. We just simply adopt the remainder of our legal arguments we made on this particular issue at the summary judgment stage.

MR. STANFIELD: And I'd ask the Court to take judicial notice of the authorities and arguments that we have made in our briefing to this point.

And just one final thing on that, Your Honor. Nexus argument is not in the statute. And then this argument about if you place it beyond your control, you have liability under the statute, there's no statutory basis for that either. And, in fact, that just feeds into the point we were talking about is, there is -- under the governmental theory as Harris County is putting it forward, I don't know if it's adopted by the State, under that theory there is absolute liability for a waste generator under these statutes, period. You can never lose that liability. That may be CERCLA liability for cleanup. Of course, this is not a cleanup case. This is about imposing punishment on people; and under this theory that has been put forward, if you have absolute liability for all time for any waste that you generated that causes a problem under these statutes. That is not the law and

that is not the intent.

And, thus, even though cause, suffer, permit and allow may be broad, it cannot, as a constitutional matter, be overbroad.

THE COURT: All right. Let's move on to the next motion.

MR. STANFIELD: I think my co-defendants want to do their --

(Discussion off the record)

MR. STANFIELD: Your Honor, just briefly. International Paper moves for directed verdict on the attorney's fees claim from the County. Their evidence is insufficient as a matter of law on several bases.

We put in the outline to the Court, and I'll put into the record, there are a couple of key cases. One is the *El Apple 1 Limited vs. Olivas* case, 370 S.W.3d 757, Supreme Court of Texas 2012. And as the Supreme Court noted, there has to be sufficient evidence introduced into the case to make a meaningful evaluation of the application for attorney's fees.

You cannot have charges for duplicative, excessive or inadequately documented work, and those have to be excluded. And you have to be able to make a meaningful review of the hours claimed because, as in this case, the usual incentive to charge only reasonable

attorney's fees goes away when those fees are going to be paid by the opposing party, or here not being paid by anyone unless the opposing party is going to pay those.

At a minimum, Your Honor, the document doesn't show what services were performed, who performed them, and at what hourly rate, when they were performed and how much time the work required.

Your Honor, here what is fundamentally missing from the evidence from the stand and from the attorney's fees records in evidence are what services were performed. We have no idea. We do know who is performing them. We do know what rate is being charged and generally how much time is being spent, but we don't know how it's working.

And in particular, that becomes a problem for segregation because what Ms. Baker testified is she segregated out two categories of fees; one was the conspiracy claim, which she said could be up to 5 percent, so she did not do a proper segregation. And also she did the counterclaims, which she said she thought could be up to 10 percent. But notably, she could not state for any record on those attorney's fees invoices who was doing anything on what particular day.

She basically stated that she was going from memory for three years and doing some rough

calculation, which was not precise, and stating, consequently, she's doing some sort of segregation. That is insufficient under the law. And as the Supreme Court stated just this year in *Long v. Griffin*, which is not yet in the *Southwest Reporter*, but it's 2014 Westlaw 1643271 at Page 3, that without any evidence of the time spent on specific tasks, the trial court had insufficient information to meaningfully review the fee request.

Black letter law, their request fails as a whole because they can't properly segregate; and even if they could segregate, they can't properly provide the Court evidence of what specifically they were doing on any given day.

Further, the conditional fees for appellate proceedings is deficient. We would cite the Court to the *Sentinel Integrity Solutions, Inc., versus Mistras Group, Inc.* case, 414 S.W.3d 911. There, basing on the *El Apple* opinion, they say that the very general testimony that appellee would incur about 150,000 in fees if the case were appealed to this court and an additional 50,000 in fees in the event of an appeal to the Texas Supreme Court was not sufficient. That's exactly what the Court heard.

"I talked to someone. I think it might be

250,000 to the Court of Appeals. I think it might be 250,000 to the Supreme Court," that's not -- that's not sufficient.

And finally, we would submit as a matter of law, having four partners at $900 an hour and paralegals at 200 an hour, doing all the work in this case, document review, redactions, everything, is just fundamentally unreasonable as a matter of law.

Consequently, we move for a directed verdict on attorney's fees. I don't know --

MS. HINTON: MIMC joins in IP's motion relating to attorney's fees, Your Honor; and we incorporate the arguments of counsel.

MS. BALLESTEROS: And Waste Management of Texas likewise joins in the directed verdict motion on attorney's fees and would adopt those arguments.

MR. GEORGE: The case they're relying on, the *El Apple* and the *Long* case, are not traditional attorney's fees cases. They are a special category of lodestar where the fee is -- you go to the Court and you say, "Those fees would not normally be enough. You need to multiply it" and ask the Court to award a multiplier fee.

That has special requirements and special analysis and needs more scrutiny, and these cases are

clearly lodestar cases and they're described as such to clarify as opposed to the traditional.

This case is using a traditional award of attorney's fees, that "We want a rate that we say is reasonable times an hourly fee that we say is reasonable," whereas in lodestar you admit that the reasonable numbers are not sufficient and want the Court to do more.

The Supreme Court, even in the *El Apple* case, has said you do not need contemporaneous time records. The people there were a little too general, but the Court made clear you don't even have to show up with time records. You probably should. We did. We provided them. They are redacted.

Now, if -- and they have to be redacted to avoid attorney/client privilege waiver. There's no question of that, and they've made no objection, no request to compel any further production. Instead, they appear to take the redactions and then kind of lie behind and claim they're going to be insufficient, even though we had to redact to preserve privilege.

But we provided detailed 400-something pages, by person, by day, and describing basically whether it was, you know, attending something or researching something or drafting something or what have

you.

Ms. Baker gave in great detail, you know, how much was involved, how many motions, how many hearings. I believe we tried to get too much into that. We received a lot of objections. And because of the limitations, we weren't able to go as far into that so that had to be -- they can't both say you can't go there and then claim it's insufficient.

But this evidence does support it. We get to the segregation. The segregation law is found in *Tony Gullo Motors versus Chapa*. I'll give the cite in a second, if I can -- basically, the idea is you're allowed to do segregation by percentages. You don't go task by task. Here the standard does not require more precise proof. You don't have to keep separate time records for when you draft unrecoverable. The opinion would have sufficed stating that, for example, 95 percent of their drafting time would have been necessary, even without the unrecoverable. And that's what Ms. Baker did.

Now, she did say up to five and up to ten. I think in reality the conspiracy would take much less than five, but we said five. The jury can do five and ten. We've said that. I think her opinion was it was probably less, but we're willing to go as far as five or

ten. So that is perfectly in line with what the Supreme Court does.

Finally, the appellate attorney's fees, she didn't just give up and give numbers. She did what an expert is allowed to do, which is to confer with a person -- the expert can rely on what someone normally relies on, and she relied on someone who is eminently qualified to speak to that, namely me; but she said she consulted with somebody, somebody she has worked with, who had great experience in determining the cost of that, etcetera, and that's what she was given. That is what a trial lawyer would do to determine appellate attorney's fees. So that would be sufficient.

THE COURT: Thank you, Mr. George.

MR. WOTRING: Real briefly. I believe we ran through the stand the number of depositions that were taken in the case, the number of days of deposition, the number of pleadings that were involved in this case, and generally the amount of time -- or specifically the amount of time and the details of what had gone on -- details to some measure of what had gone on in the case as a basis for the request of attorney's fees of approximately $10.6 million.

So we think there is more than a scintilla of evidence to support the -- Harris County's request

for attorney's fees in this case.

MR. GEORGE: And just for the record, I said I would give the *Gullo* cite. It's *Tony Gullo*, G-U-L-L-O, *Motors versus Chapa*, C-H-A-P-A, 212 S.W.3d 299.

THE COURT: All right.

MR. STANFIELD: The only other thing I wanted to say that I forgot to say is I do believe that it's also incumbent upon the County to segregate their fees by specific statutory claim they're making because, of course, if they don't recover under all three statutes for all the time periods that are being sought, then they can't recover the fees for those days and those time periods. So I think they needed to be specific about that.

I'm very familiar, of course, with the *Tony Gullo* case. I would just say that when you take *Tony Gullo* through the recent opinions, there is a lot of specificity required by the Supreme Court of Texas and there are a number of attorneys who thought they had recovered attorney's fees who no longer have them.

So, in any event, we stand on our motion on that; and I think we can take a break, unless counsel wants to further respond.

THE COURT: Did you want to respond any

further, Mr. George, on the issue with regard to segregation of fees by statute and time period?

MR. GEORGE: The only last point is segregation can't be a directed verdict ground because evidence as of the *Gullo* case, evidence of unsegregated fees is some evidence of the segregated and those were always reverse and remand. So it couldn't result in a directed verdict.

THE COURT: Anything further?

MR. STANFIELD: No, Your Honor.

THE COURT: Why don't we break and I'll see you back in one hour.

(After a break, the following was had:)

THE COURT: Are we moving on to the Waste Management --

MR. GIBBS: We are, Your Honor.

If it please the Court, on behalf of Waste Management of Texas we have our motion for instructed verdict. Your Honor, at the outset I think it's important to remind the Court as a point of reference in reviewing our motion -- the grounds for our motion for instructed verdict, that there has been a series of admissions and undisputed facts as it pertains to Waste Management of Texas and that confirm how narrow any conceivable questions that HC might even inquire about

or suggest go to the jury exist on this record.

First, it is conceded and not in dispute that Waste Management of Texas is not an owner or an operator of the facility or site in question. It was in no way involved in any activities which created the opportunity for any risk of discharge, design or construction of the site included. It was not thereafter, as undisputed in the record, in any way involved in any activities whatsoever related to the maintenance of the facility or its operations.

For both Waste Management of Texas individually and as alleged in the Harris County theory in any way through GC Environmental, the relationship to the facility in question argued against Waste Management of Texas is solely as the owner of stock of a separate corporation, which was for a limited time an operator of a site for some nine months.

These two parties, that is, GCE and Waste Management of Texas, whom the plaintiffs have stipulated were and remained at all times separate corporations in good standing, from MIMC and from each other, it has been stipulated in the record that at all times each separate corporation was separate and distinct from MIMC and MIMC, in turn, from each of those two entities.

And the plaintiffs do not contend in this

case that MIMC was the alterego of either GCE or Waste Management of Texas; and they have likewise stipulated that they are not claiming in this case that they are seeking or entitled to pierce the corporate veils of MIMC, GCE, or Waste Management of Texas in any way.

Again, the sole basis for imposing liability sought in pursuit here against Waste Management of Texas is based upon a claim of a right of control, which adheres in any parent or subsidiary stockholder relationship standing alone; and that is urged as a basis under the statute to impose liability for, quote, "cause, suffer, allow, or permit" -- permitting discharges on any specific date on the facility. And they have argued pursuant to that that the exercise of the basic rights of a controlling shareholder can be taken somehow as evidence of control of a type rendering a parent directly liable for allegedly failing to prevent a subsidiary corporation, in turn, from permitting a discharge to occur.

Now, with that series of undisputed facts and positions before the Court, I turn to specific grounds for the remaining review of what is left of any evidence that is purported to create an issue on any relevant element of the cause of action that is currently being pursued against Waste Management of

Texas. I'm going to -- I'm going to outline three specific grounds on behalf of Waste Management, Your Honor; and then some of my colleagues will follow up with some brief explications on some of our other grounds, some of which have been covered in part and we won't repeat those parts that have been covered, if that's acceptable to the Court.

THE COURT: Yes.

MR. GIBBS: There are issues here that we are outlining which we believe are absolutely unique in this case and on this record to Waste Management of Texas. The Court has under related -- a related point of law already, and correctly we believe, granted a dismissal against Waste Management, Inc. We submit that, based upon the same legal principles that have been previously urged there, likewise Waste Management of Texas should be dismissed at this point in time and an instructed verdict granted.

We recognize that the Court has, since the urging of that position at the outset of the case, now given Harris County full opportunity to present whatever evidence it could or has that might raise any arguable disputed fact question to go to this jury upon which it could impose liability against Waste Management of Texas; and we submit that there is no evidence. You've

given them every opportunity, and here are the grounds:

First, in short, Harris County has failed to present evidence sufficient to raise a fact question on the claim that Waste Management of Texas caused, suffered, allowed, or permitted any violation of the Texas Water Code general discharge provision or the Texas Spill Act. Importantly, the County fails to clear this hurdle both with respect to the -- what we call the "GC Environmental Era," that is April of 1992 to December of 2003, and what we refer to, open quotes, the "WMOT Era," January of 2004 to March of 2008.

Our Instructed Verdict Ground No. 1, Your Honor, Harris County has not presented evidence that GCE, during the period from April of 1992 to December 30th of 2003, engaged in any conduct or activity with respect to the site, number one; had any knowledge of the alleged discharges, number two; or otherwise had any affirmative connection to the site or alleged discharges whatsoever, number three, apart, as we have suggested, from GCE's mere corporate ownership of MIMC's stock during this time period.

Now, in the case-in-chief, Harris County submitted in total on this issue two documents and no testimony regarding whether GCE caused, suffered, allowed, or permitted a discharge during the period

April 2, '92 through 12/30 of 2003: One, a 1992 letter sent to Tom J. Fatjo, Jr. from the shareholders of MIMC, and that's Plaintiffs' Exhibit No. 145; and second, the 1968 board minutes of MIMC, Plaintiffs' Exhibit 143. So Harris County has, thus, put before you the basis for over a decade of alleged civil penalties with merely two documents, each of which contain only one relevant paragraph, as they have submitted them.

The 1992 letter, you'll recall, to Mr. Fatjo stated, in relevant part, that the company owns land adjacent to the San Jacinto River and Interstate 10, which at one point was used for certain of the waste disposal activities of the company.

The letter went on, "With respect to such land, the Company has received no notice regarding a pending or threatened liability or administrative action under any Environmental Laws and, accordingly, no liability has been accrued on the Audited Financial Statements or the Interim Pro Forma Financial Statements therefor. It should however be noted that due to the expansive nature of the Environmental Laws, the Company may at some point incur a liability under the Environmental Laws with respect to such land." You are intimately familiar with that language; secondly, the '68 MIMC board minutes, which again indicates the

discussion then turned to certain real estate owned by the corporation on the San Jacinto River, etcetera.

These two pieces of evidence, we submit, comprise Harris County's entire case against GCE. Most importantly, we would point out to the Court for -- what they did not say. First off, they were not put on and presented by any witness that provided any of the context, that provided any indication of when or by whom these may have been, if they ever were, viewed by any representatives of GCE, that what their reactions were, what the circumstances were of any response, if they were viewed, at what point in time they may have been in any of the company's records, etcetera. There was no witness whatsoever to even provide any of that type of background. That is left solely for what they hope will be lawyer argument for closing.

Likewise, none of -- the '68 minutes and the 1992 letter, Your Honor, did not explain that had Mr. Fatjo looked, no MIMC property records would be found for the land. It was actually -- it contained a document they point to contained what we now know and what later evidence showed in the case was a misstatement of fact, which would have deflected tension away from even the notification of any ownership of the land, had it been something that someone at GCE looked

at at a point in time, which is, itself, a matter of pure speculation and unproven.

Secondly, these documents do not describe the nature of the generally described waste disposal activities. They did not indicate that the material disposed of was waste paper mill waste. They did not identify the material disposed of as hazardous or as containing dioxin and did not notify Fatjo of any occurring or potential discharge. Instead, the letter indicated that no actual or even theoretical environmental liability currently existed with respect to the land.

Harris County necessarily contends two, what we submit are innocuous, paragraphs cited above are sufficient to show that GCE "caused, suffered, allowed, or permitted" a discharge of dioxin for every single day for the next decade. Harris County is wrong, we submit. First, there has been no evidence presented that GCE ever received or saw the '68 board minutes. They just offered the document through another document -- document-reading witness, if you will.

But even if it had, neither those minutes or the 1992 Fatjo letter get Harris County even off the starting blocks in our opinion. The nationwide case law construing the terms "cause, suffer, allow, or permit"

require proof that the defendant, as we have shown you, Your Honor, engaged in some conduct or activity with respect to the site, number one; number two, had some knowledge of the alleged discharges; and three, had some affirmative connection to the site or alleged discharges.

And we would remind you and refer you again to the cases that we brought to you, and we brought to you alone, from other jurisdictions that dealt with substantially identical, if not in some instances virtually identical, language to that contained within the statutes.

The -- on point particularly was the *Matter of Chicago* -- the *Chicago Railroad* case and *U.S. vs. Launder,* the Ninth Circuit opinion that we pointed out regarding the federal -- failure to contain a fire on federal land; and thirdly, *Rose vs. Ben C. Hebert,* which is the Beaumont case that we brought on, and *Sandhill*, which was the 2014 case out of Amarillo.

The case law, we would suggest, that we have pointed out to you supports the notion that all three of these elements must be established to support liability under this type of language in Texas and elsewhere. Nevertheless, because Harris County has presented no evidence on these elements, the Court

should grant an instructed verdict in Waste Management's favor, as long as to "cause, suffer, allow or permit" requires any one of those elements and they remain unproven in the record here.

First as to the absence of any evidence of conduct or activity by GCE -- we're still in the GCE Era -- Harris County presented no evidence that GCE engaged in any conduct or activity with respect to the site. In fact, there has been no testimony or document presented to the jury that reflects any conduct or activity of GCE, whatsoever, beyond a mere fact that it acquired the stock of MIMC in 1992.

The sole testimony on the matter is from Mr. Rivette, and you will remember they called Mr. Rivette -- can you put that up -- on -- we're going to have to rely on the power of the persuasion of our arguments rather than a PowerPoint, but I have a couple of slides in any event.

You'll recall that Rivette twice testified, and this is the only evidence from anyone on this point, regarding -- and he was there as the corporate representative for WMOT -- what Waste Management of Texas knew regarding what actions GC Environmental took in 1992; and he confirmed under oath twice that they, in fact, had no knowledge that -- that Waste Management of

Texas had no knowledge of what GC Environmental knew back in 1992 with respect to these documents, or anything else relating to the transaction and ultimately any threat or risk of discharges at issue in the case.

You'll recall that in the *Chicago Railroad* case, the plaintiff tried under virtually identical language to impose liability. There the regulator in that case, finding that -- a similar clause which said "'cause, permit or suffer' an environmental statute to include and reflect the traditional version of strict liability as a theory of recovery and that it is based on the idea that a defendant engaged," quote, "'...engaged in some kind of activity' which exposed others to a risk of harm and that the activity justified allocating a risk to the defendant."

The *Rodriguez vs. Sandhill Cattle Company, L.P.*, was the Amarillo case which affirmed a directed verdict on an interpretation of "permit" as to "suffer, allow, or consent," holding that the standard required conduct undertaken by one who failed to act reasonably.

Under those cases -- and you'll recall that in the *Matter of Chicago* they attempted to come 50 years later, just as they are here, and impose upon the acquirer of a rail yard liability for the discharges that had gone on over the 50-year period, or occurred

beginning 50 years earlier, based solely upon the ownership -- the acquisition of ownership and control of the rail yard; and the court flatly rejected it, saying this is what you would have to prove. And there was no evidence of it there, and there is no evidence of that here.

The second point, there is no evidence, we submit, that GCE had any knowledge of the alleged discharges. Harris County presented no evidence that they had any knowledge of any discharges or even the potential for any discharges. Neither of the two documents comprising Harris County's exclusive evidence include reference to or a warning about a discharge or potential discharge, much less a discharge of paper mill waste or dioxin.

The sole testimony, again, is from Mr. Rivette on this point, that Waste Management of Texas had no knowledge of what GC Environmental knew in 1992. Harris County introduced no other documents, presented no witnesses on, and asked no questions about what GCE knew from '92 to 2003.

Harris County presented no knowledge of any discharge or even potential; and they are, therefore -- we're, therefore, entitled to a directed verdict on claims on those penalty dates premised on GCE's

liability. And we would cite the *Rose* and the other cases, *Launder* and the *Milwaukee Railroad* case for that proposition.

Those cases, likewise, have held, as did *Rose*, that interpreting the statutory language "permit" as meaning to "suffer, allow, or consent" and holding that each of these concepts -- quote, "...each of these concepts presupposes knowledge on the part of the person permitting a particular act," discharges here and *Launder* being to the same effect, interpreting the statutory language "permits or suffers" to require, quote, "knowledge, a willingness of the time and responsible control or ability to prevent."

Now, the only thing in addition to that that has been provided by the County is the notion of overlapping directors in or about 2002 and certain officers from and after 2001 and later; and we submit that overlapping directors does not indicate knowledge of the 1965 operations or even of knowledge held by directors at GCE back in 1992.

Harris County, we've seen, has suggested that evidence of overlapping directors between MIMC and GCE starting in 2002 -- 2001 or 2002 is some evidence that GCE had knowledge of the site. There is simply no evidence, we submit, however, Your Honor, that MIMC's

officers in 2002 knew anything about the site to pass on to GCE's officers.

As of 2002, the site had not been operated for over a quarter of a century. It had been 10 years since GE had acquired MIMC and nearly eight years since MIMC had any operations at all. Moreover, there is no reason to assume or speculate that MIMC's 1992 directors knew anything about the site beyond what was in the 1992 letter to Mr. Fatjo.

With no evidence to support the knowledge existed in '92 or that it was transferred among officers over the next decade, it is utterly unsupported speculation that GCE was ever the recipient of the particulars about the site. The overlap of MIMC and GCE directors in 2002, therefore, is irrelevant. The sole evidence of GCE's knowledge about the site remains the general statements in the 1992 letter to Mr. Fatjo, which was, as you will recall, a single paragraph in the document, I believe, in excess of 90 pages long.

There is no evidence, thirdly, that GCE otherwise had had any affirmative connection to the site, another element of the cases we have cited to you. There is no document or testimony presented to the jury that indicates GCE ever affirmatively did anything with respect to this site. On this record GCE did not

violate the statute. We would again refer you to the *Matter of Chicago Railroad*, noting that in both *Sea Farms* and *Nordevan,* the owner is responsible for pollution done on its land by those acting with its knowledge and permission.

The court went on to say "It's a far cry from Union Pacific being held liable for pollution caused by Milwaukee Railroad during a half century before Union Pacific bought the land."

Now, GCE's ability to replace the MIMC board, we submit, which is another fact in a series of facts that they have relied upon here, is not an affirmative connection as a matter of law. They had Joan Meyer testify, you'll recall, that "As a hundred percent shareholder, I have the right to appoint directors and change them" and that somehow by inference provides some basis of an affirmative connection between GCE and the site. But GCE's right to replace directors of MIMC is not an affirmative connection to the site about which GCE had limited knowledge and never any -- directed any conduct.

Secondly, and critically, the right to replace directors of a subsidiary, as a matter of law, is not evidence of control over an aspect of the subsidiary's business or operations, period. As the

Texas Supreme Court has explained -- it has drawn this distinction in the 1995 case, and I'll hand you up a copy of it in a moment, Your Honor, of *Centeq Realty, Inc. vs. Siegler*, 899 S.W.2d 195.

And the Court there says -- and it was a case where premises liability was asserted against the owner of a corporation upon which the injury to the plaintiff was sustained, and the question was whether or not proper security by the subsidiary company had been maintained.

The Supreme Court said, "We conclude that Centeq's power to elect a majority of the board of the Warwick Council was entirely distinct from the power to control security. The only 'control' wielded by *Centeq* related to its majority vote in electing board members, not to the rendering of decisions affecting security measures. Centeq had no direct power to make security decisions, and consequently, its influence, if any, upon the Warwick Council was too attenuated to constitute 'specific control over the safety and security of the premises,'" precisely the point we're making here.

And Dr. Bedient testified, you'll recall, on October 21st:

"QUESTION: And so Waste Management wasn't in any position to stop anything. It had no

relationship and didn't own the stock of MIMC at that point," that is the '70s and '80s and '90s, "correct?

"ANSWER: I understand, yes."

So in summary on the GCE era, if you will, Your Honor, the sole evidence are the two documents we've described and that lack any detail that would have put GCE on notice of a violation. In fact, they made no showing of any circumstances under which they were reviewed or by whom or what sequence of events is to be -- to be taken from any of the circumstances which are not illuminated in any form of testimony by any witness about the receipt, review, or action, or not, on any such documents.

As indicated by the case law we have cited, the statutory language "cause, suffer, allow, or permit" requires clearly more than merely the stock ownership; and the exercise by the parent, as we have shown in repeated cases, starting with the U.S. Supreme Court in what is -- the Court, you'll remember, that was a unanimous opinion, a unanimous opinion led by Justice Souter in which the bedrock principle of the separateness of these corporations is noted.

And the implication that they are now attempting to make, that they can put before the jury and make the argument, which is a law argument and, I

submit, contrary to the law, so it's a contrarian law argument to the jury, which is where we're headed if they're permitted to proceed with this argument, is to the effect that the fact of the exercise by a shareholder, a controlling shareholder, of the attributes of shareholder and controlling shareholder's rights in and of itself can create any evidence -- probative evidence of a right to control here or engage in activities at the site level in the business of the subsidiary.

One important aspect of that, Your Honor, in the -- that is related specifically to that, if you'll think about it, the -- we gave you some six Supreme Court cases which have articulated against the bedrock principle led by the *Gladstone* case, which I know you have had a chance to read, but I want to remind the Court again, now that we've seen what the evidence is that they're trying to use as a factual matter to put to a jury to make a jury argument, is a legal proposition that is solely for the Court and not -- not to compel us to be arguing this to the jury. It is contrary, I submit, to the Supreme Court authority of Texas -- of the United States as it relates to these bedrock corporate principles.

Creation of affiliated corporations to

limit liability, while pursuing cause, suffer, permit and allow goals, lies firmly within the law and is commonplace. We have never held, never held, corporations liable for each other's obligations merely because of centralized control, mutual purposes, and shared finances. There must also be evidence of abuse, or as we said in *Castleberry*, injustice and inequity.

That's why I said at the outset -- it is enormously important, as a point of departure, that they have stipulated there are no alterego issues to go to this jury, no veil piercing issues to go to this jury. That is precisely stripped back. That is precisely where we've found ourselves.

They are trying to make, take, and create an opportunity, impermissibly I submit, to argue what are contrary to what are the bedrock principles of WMOT's rights to -- to appoint directors and officers of a subsidiary company and generally the right to control at that level as a shareholder. They want to argue that that is evidentiary, coupled with other facts that they have pointed out, which I'll address in a moment, that they can support an evidentiary argument, so that they can get an evidentiary finding to impose liability, contrary to the principles of law we're talking about here.

A related bedrock principle that is noted in the *Best Foods* case is that it is a general assumption that when you prove what is undisputed in this record, and that is that we appointed -- Waste Management of Texas appointed certain directors and officers in that 2002 forward period, that it was simply -- it was simply exercising appropriate rights.

There is a general presumption that arises out of that evidence that they have cited here that, in fact, those subsidiaries -- these and those are operating solely in their capacity for the subsidiary and not in their capacity for the parents and that you have to, therefore, approve conduct. That's why the conduct requirements come in. You have to overcome a general presumption.

The principle that they are articulating and now want to skip, not only to negate the general legal presumption that they would otherwise be subjected to there, they -- where a party -- in order to maintain under general principles of corporate law, maintain the independence of the parent from the subsidiary, it has to refrain from doing exactly what they're claiming here it did. They have no evidence of it.

THE COURT: In other words, your position is that the bedrock principles prevent them from doing

the very thing they say you should have done, meaning as officers of MIMC should have then told Waste Management of Texas do X, Y or Z?

MR. GIBBS: Exactly, because the whole principle -- set aside alterego and veil piercing. They are not a part of this case. The jury has no right to have it implied to them that there is anything here that would permit that, including, by the way, in the face of the fact that this -- this is an absolutely stipulated -- as we sit here, MIMC has stipulated to be a corporation in good standing.

You can be a nonoperating entity incorporation and you don't have to have operations. Yet, they're trying to say that the -- that the fact that they had no operations, that operations ceased in '94, is something the jury should consider in determining whether or not we're liable. That's directly contrary to these legal principles.

The general assumption -- and I'm going to read it to you. This was out of *Best Foods*; and it was critical because we're being -- we're being not only deprived of it, but the jury is receiving a question that only goes to a judge.

It says, "This recognition that the corporate personalities remain distinct has its

corollary in well-established principle of corporate law that directors and officers holding positions with a parent and its subsidiary can and do "change hats" to represent the two corporations separately, despite their cause, suffer, permit and allow ownership. Since courts generally presume that the directors are wearing their subsidiary hats and not their parent hats when acting for the subsidiary, it cannot be enough to establish liability here that dual officers and directors made policy decisions and supervised activities at the facility. The Government," the County, "would have to show that despite the general presumption to the contrary, the officers and directors were acting in their capacities as subsidiary officers there in that case and not as the parent officers and directors when they committed those acts."

It has to have activities on top of that. In fact, there is a general presumption that you have to overcome in the first place; but that's not -- none of these arguments are arguments -- despite how they want to put them to the jury, these are not jury questions.

So we would be deprived under that -- under their theory here, we would be deprived not only of the benefit of that general presumption, but also of the prohibition under bedrock principles of corporate law

that if you want to maintain your right, your legitimate right to operate through an independent subsidiary protected from its liabilities, or limited to its asset-based liabilities, you cannot do what they're saying we should have done. And that is go in and take over at a given point in time, even if we knew about it; and there is no evidence we did. You cannot be required -- or you are being required to forfeit and pierce your own corporate veil.

So putting all that together, this is a law question. It is not a fact issue. They, I expect, are going to -- from what they have provided to us are going to argue that caused, suffered, allowed, and permitted MIMC's violations of law at the WMOT level included the following facts:

WMOT was a hundred percent owner of MIMC; WMOT appointed sole direct -- it sole directors; MIMC's sole director was also WMOT's sole director. They have the same officers; MIMC had no operations since '94 and had had no employees.

So what? Those are all stipulated facts. It doesn't make any difference, and none of those constitute a legal basis upon which to impose liability for the -- for the actions or omissions of a subsidiary corporation under any statute, any environmental

statute, etcetera, and certainly not under these statutes.

He asked the question why does MIMC exist; and the witness said, "I have no idea." So what? On this record MIMC, as they have repeatedly admitted, it's a viable corporation, it's a separate company. It's a nonoperating company, but a separate company.

And they said -- so given those factors, they know that they have to come up with some kind of a case that says otherwise against this enormous volume and body of case law in Texas everywhere that says you can't do this and those statutes got to be construed this way, certainly not a statute under the anti-abrogation principles observed in Texas and in the *Best Foods* case.

And I gave you those cases the other day, as well, that says if the statute even wants to have a shot of doing that, of capsizing, as I put it, 200 years of corporate bedrock principle, it has got to at least say so. None of these statutes say anything of the sort. It certainly would not be implied.

They have submitted, because, again, they know they need to, what they contend is a reference to a case that is -- that purports -- a Supreme Court case that they suggest purports to say that a subsidiary can,

in effect -- that on the issue of control a subsidiary and a parent can be treated as one. And they cite *AHF-Arbors*, A-R-B-O-R-S, *at Huntsville I, LLC, IV vs. Walker County Appraisal District,* which is at 410 S.W.3d 831.

Now, that is a case -- let me just take one moment, if I may, because I think that's what they've suggested and I want to tell you why I think the case is -- it's significant in only one respect not intended by them. It's whether a certain community housing development property tax exemption can be taken by an equitable owner or whether legal ownership is required. That was the ultimate issue.

The Arbors were two LLCs and each owned an apartment complex, and the sole member of each was the parent Atlantic. Atlantic was the CDHO. The Arbors wanted to get the CDHO tax exemption as to each -- for its sole member for their apartment projects, for the owner. To do so, they conceded that the entities in that case were indistinct, in other words, totally opposite, the arguments that are being made here.

In that case, the parties were -- the parent and subsidiary were saying for the limited purpose of obtaining the tax-exempt benefits of the subsidiary, they were to be treated -- and it was not

only not contested, it was affirmatively argued by the two parent parties, which was the parent and the subsidiary in that case.

So the court, therefore, said assuming that control, that could render the parent under that situation the equitable owner and it would have the right then to take the tax benefit. When you read that case, you'll see -- to quote the actual language from the case, it says, "Although the Arbors are not TDHCA-certified CHDOs as Atlantic is, they argued that they are indistinct from their parent," the parents said fine, "which operates the apartments through them in compliance with all requirements. For federal income tax purposes Atlantic and the Arbors are treated as a single entity."

That case provides no basis to argue that the bedrock principles of corporate separateness and corporate law and/or, importantly, the issue of control is other than as we have said. It was a presumed issue there.

So Instructed Verdict Ground No. 2, Harris County has not presented evidence that Waste Management of Texas during the period December 31, 2003 to March 31, 2008, that's four years and three months that we've identified, one, engaged in any conduct or

activity with respect to the site; two, had any knowledge of the alleged discharges; or three, otherwise had any affirmative connection to the site and apart from Waste Management's mere corporate ownership.

THE COURT: Can I interject one thing --

MR. GIBBS: Yes, Your Honor.

THE COURT: -- just because we've talked about this in different ways in different parts of the trial; but as I understand it, the penalty period is supposed to end at March 30th, 2008, is it not?

MR. WOTRING: That's correct.

THE COURT: Just because it's been referenced as March 31st in some places; but I think we all agree it is March 30th, right?

MR. WOTRING: Correct, Your Honor.

THE COURT: Just for the record.

MR. GIBBS: I have observed that it has appeared in both formulations, and I gave them an extra day.

Just as we would point out with respect to WMOT, that just as the case with GCE, the same two documents are argued as being basically the only evidence not supported by witness testimony in the real time or any explication of anybody -- of it being received, reviewed, or any action taken or not taken

with respect to the receipt of any such documents or, in the case of WMOT, any knowledge that GCE back in 1992 had received any such documents or had access to any such documents.

The documents remain for the WMOT analysis as benign as they were below, but WMOT is even further removed from them than GCE. Neither was addressed to WMOT. There is no evidence or implication that WMOT ever viewed either document; and there was no evidence or implication that it had some duty, obligation, or even reason to do so.

And so for the reasons that we articulated previously here, there is -- as to allege liability incurred by GCE pre-merger, it should also dismiss the case against WMOT post-merger. First, there is no evidence of any conduct or activity by WMOT.

Would you put up that -- one of our limited slides?

This is the testimony of Mr. -- of Dr. -- what is his name? Pardue. Dr. Pardue. And Dr. Pardue, you'll recall for these purposes, Your Honor, was -- he was -- he was sent out to look at documents and to provide a timeline.

Oh, this is Bedient, I'm informed. We didn't have it labeled. It's Dr. Bedient; and his job

was to, as you recall, be a chronicler of after-the-fact historical documents:

"QUESTION: Well, the responsibility for the design -- for the design of the site, that doesn't lie with Waste Management of Texas, you'd agree with that, correct?

"ANSWER: I agree.

"QUESTION: And that's not something that you point the finger at Waste Management to as far as who abandoned the site in '68, correct?

"ANSWER: No.

"QUESTION: You would agree with me that you don't believe that Waste Management was responsible for any of the maintenance on the site after '68, correct?

"ANSWER: Correct.

"QUESTION: And, sir, isn't it true that you have no opinion or information -- no opinion or information as to what Waste Management either did or didn't do," i.e. failed to prevent, "to cause any discharge of dioxin from the site into the river from 1965 going forward?

"ANSWER: I'm not offering an opinion on Waste Management specifically, no.

"QUESTION: Sir, with all the records that

you've reviewed related to this site, it's true that you didn't review any records related to Waste Management engaging in any activity on this site starting from New Year's Eve going into '04 until 2008, correct?

"ANSWER: Correct.

"QUESTION: And you can't point to any activity that Waste Management took with respect to this site at any point in time in what we're calling the penalty period, that is, from 1973 through the end of March 2008, correct?

"ANSWER: Correct."

Again, this came after he testified he reviewed all these historical documents and had access to all that information for Harris County out there. And that was what he was instructed to do; and he was asked to develop -- he said, quote, "...develop a timeline that things -- what things happened when, who was involved, you know, why did they make that decision."

This is their own admission from all the documentation of their own witness as part of his assignment. In short, with this knowledge of the documents and timeline, he affirmatively testified that he could not point to any activity Waste Management took to -- with respect to the site at any point in time in

what we're calling the penalty.

MR. WOTRING: I'm sorry, Bedient or Pardue?

MR. GIBBS: Bedient.

Secondly, Waste Management -- there is no evidence Waste Management had any knowledge of the alleged discharges. Again, the sole piece of evidence of Waste Management's knowledge or lack of knowledge here that came in of even the mere existence of the site prior to June of 2005 is Defendants' Exhibit No. 8, a June 6th, 2005 e-mail exchange between Cedilote of the TCEQ and Joe Fisher of Waste Management.

You'll recall in that that Mr. Fisher stated, "I checked further with my local field manager and others to gain additional information whether we have ever owned the 20-acre tract near I-10 and the San Jacinto River. None of the people were familiar with the site and none of them believed we ever owned it."

In short, Harris County has presented no evidence that Waste Management of Texas had any knowledge of the site, much less the discharge.

The fact now of Waste Management and MIMC had the same directors appointed by Waste Management post-merger does not indicate knowledge. Harris County, as we've indicated, has suggested that evidence of overlapping directors between Waste Management and MIMC

post-2003 merger with GCE is some evidence that Waste Management had knowledge of the site.

First, no evidence connects these directors with MIMC during the time of operations at the site in '65 to '66; second, nothing connects these directors during the time before MIMC completely ceased all operations in 1994; or third, even through 1992, when the shareholder letter was purportedly written and addressed to Mr. Fatjo, in fact, the post-merger MIMC directors were the same individuals that were appointed to be Waste Management of Texas directors by the sole director of Waste Management of Texas.

In other words, they were not legacy directors. No evidence in this record indicates these new post-merger directors of MIMC knew anything about the site which they could even hypothetically share with Waste Management of Texas.

Finally, the third element, there is no evidence that Waste Management of Texas otherwise had any affirmative connection to the site. Harris County presented no such -- no such evidence beyond the evidence of corporate ownership to connect WMOT to MIMC and, even more tenuously, none to the site.

As we've pointed out in the *Centeq Realty* case, stock ownership does not indicate operational

control. It is also, it seems to me, worthwhile to be -- for us to be reminded, Your Honor, at the instructed verdict stage, and particularly in a case where we have a couple of exhibits, a couple of documents that have been put in that are substantially vintage, shall I say, and have been unattended by the actual -- by any explication, by any witnesses in the real time or anything approaching the real time as to the circumstances surrounding them, who got them, who read them, what actions were or weren't taken, what communications existed or may not have, the fact that there are no other documents found about a particular subject -- I noticed one thing that has recurred in the absence of any of this affirmative evidence offered ever by Harris County on these various matters is they would adopt the approach of asking the witness, after looking at one of these two documents, "Have you looked -- are there any other documents in effect relating to this subject matter from back in that era?" And the witness would say, "I know of no other documents."

That is -- that doesn't mean -- that is of no consequence or no probative value, when you're talking about something from that vintage. There are all sorts of inferences that can be drawn with respect to documents that go by 20, 30, or 40 years among all

the records of the business. It may have been that there may have been no activity -- about other activity and that's why there are no other documents that one has found. It may have been there was activity but it was never recorded in the document. A witness could testify about it, but they brought no such witnesses. Or it could be that some of -- some activity did or did not take place or some review was made of it or discussion was had about it and it was documented somewhere, but the document has since been lost or destroyed.

We have no -- we are left here with nothing but inference upon inference upon inference; and what they want to do is to simply have those documents in the record and then make lawyer arguments about what are the implications and inferences, lawyers interpreting those bare documents. And I submit that the case law that is thereby implicated are the cases that say that it is absolutely inappropriate for -- and it will not sustain a submission and/or a finding by a jury to submit any fact that is a matter of speculation, in which it is no more than an inference piled upon an inference.

And I submit with respect to the documents we have here, that is precisely what we have. For example, in the -- I think it's the *Schlumberger* -- yeah. The principle laid down in *Schlumberger Well*

Surveying vs. Nortex Oil & Gas, Texas Supreme Court, the court there in a proof of conspiracy case, where, of course, you have some latitude to prove by circumstantial evidence things that make up or might prove a conspiracy, but the court laid down that "Even in that broader context or more relaxed context, we may recognize -- we recognize proof of a conspiracy may be unusually -- must be made by circumstantial evidence but vital facts may not be proved by unreasonable inferences from other facts and circumstances, or as has so often been said by this court, a vital fact may not be established by piling inference upon inference," as would be required in this case.

And in -- for example, in the case of *Southwest Olshan Foundation Repair Company vs. Gonzalez*, 345 S.W.3d 431, San Antonio Court of Appeals, Your Honor, the court there -- it was a case -- a case in which fraud was alleged against a -- by a homeowner against Olshan in connection with some purported representations regarding certain equipment that was to be incorporated in the house.

And the -- in the fraud claim, one of the elements is reliance. So the plaintiff there was saying that she could prove her reliance, what she would have done had she been told the truth, she would have done a

series of things, a series of sequence of things would have happened, quite analogous to the circumstance here where they are saying, "Well, here is a couple of documents and here -- I want you to assume a bunch of sequential events would have happened if somebody read them or talked to them or examined them and this might have happened, that might have happened."

There is a sequence of purely speculative events, and particularly with old documents that far back that have been -- that have not been testified about by a single live human being before this jury to explain the circumstances, or anything else.

But in there -- in the analogous circumstances, the court reviewed the series of inferences that would be required to support Plaintiffs' claim that she reasonably relied in not having received the information because of the failure to disclose in that case and said -- the court says, "Instead, the evidence raises the following series of inferences: Olshan knew the system suggested by Linehan was the better system, but Olshan instead decided on its own without discussion with the Gonzalezes to utilize its Cable Lock system; the Gonzalezes would have chosen the more expensive system had it been offered; any representations made to Nelda that the Olshan system was

performing as intended were false; and if Nelda had read Couch's or BEC's report, she would have relied upon the reports to her detriment. These inferences amount to impermissible inference stacking. In other words, each inference raised by the evidence would ultimately be premised on another inference. At best, the circumstantial evidence presented amounts to a mere suspicion that Olshan acted fraudulently."

And I put those principles before you, Your Honor, because I think in the situation which we have, we find ourselves where they have made these acquisitions but have supported them in -- as it relates to Waste Management of Texas in non-evidentiary form. There is no evidence of the factual types of evidence that would be required to establish liability under a "cause, suffer, allow or permit" type of statute, according to the case law, that there is absolutely no ground upon which they can, as a substitute or surrogate for that, can take what they have shown here are a list of legally permissible things for a corporate parent to do and suggest to the jury, in a case that has nothing to do with alterego, nothing to do with veil piercing, and suggest to them that they can consider that as evidence of control, because that is directly contrary to every case we have been able to find at any level

around the country on anything approximating this kind of a claim.

So these are not even arguments, I submit again, that can appropriately be compelled, I think, to a jury because they're not -- these are law points. I can't read them, the points out of *Best Food* and the like.

So as to those grounds -- those are the three verdict grounds that I wanted to cover with the Court. We submit that at this point in time the Court has indulged and given them every opportunity to demonstrate that there was some set of facts here that would establish activities -- actions by WMOT that would appropriately under these statutes submit it to some kind of liability finding. They have failed to do so, and as a matter of law we submit nothing has been demonstrated or proved to the level of either a scintilla of evidence that should go to the jury on any disputed question of fact under those statutes.

Thank you.

THE COURT: Thank you.

Mr. Wotring, why don't you start out, if you would, and address one of the points that Mr. Gibbs made, which is that, and this is as he's putting it, the, quote/unquote, evidence you're using with regard to

WMOT to show that they had knowledge or control actually contradicts what those things mean under the law in other areas, for instance, that somehow by being directors of MIMC and also WMOT, that you can impute the knowledge they have as directors of MIMC to WMOT and/or that you are -- essentially to impose liability on them in this situation, requiring WMOT to pierce their own corporate veil. Even if you don't say that's what you're doing, that's what you're suggesting they should have done in these circumstances to act appropriately and not violate the environmental laws.

MR. WOTRING: And the Court has asked a question that in all the hour and five minutes of argument I think was really the only new argument I had heard from counsel for Waste Management; and that is that somehow the control that GCE first, and then Waste Management of Texas, asserted over MIMC to comply with environmental laws would be tantamount to piercing the corporate veil between MIMC and GCE and MIMC and Waste Management of Texas. That, indeed, is a new argument that had never been presented before; and I don't think it's consistent with Texas law.

I think we can very much instruct and exercise the control envisioned by these environmental statutes over their subsidiary in this circumstance

without subjecting themselves to liability for piercing the corporate veil. We have a very different understanding about what is required to pierce the corporate veil in those types of circumstances.

And, you know, I think it's instructive for the purposes here -- that I don't know how many times we've argued about Waste Management of Texas' connection with the case, but it's several times. I don't know how much briefing we've gone back and forth, but it's more than several. And this is the first time we've heard them make the argument that they would have to pierce through to exercise that kind of control, and I think that's simply inconsistent with Texas law about what is required to pierce from MIMC first to GC Environmental and then into Waste Management of Texas. They very much exercise control over their subsidiary to follow the law and comply with the environmental laws, without being subjected to piercing of the corporate formalities in that circumstance.

Possibly the other single most greatest difference between --

THE COURT: Let me ask you a question about that, if you don't mind.

MR. WOTRING: Certainly.